Supreme Court, U.S.
FILED

No. 05- 051113 MAR 1 - 2006

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IN THE

Supreme Court of the United States

XLP CORPORATION, *et al.*,

Petitioners,

v.

THE COUNTY OF LAKE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ILLINOIS APPELLATE CIRCUIT COURT
FOR THE **Second Judicial District**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the confusion and differential interpretation of this Court's decision in *City of Los Angeles v. Alameda Books,* coupled with the disjointed framework of this Court's prior fractured decisions in the area of adult entertainment, result in both First Amendment and Due Process violations because of the conflicting and inconsistent evidentiary standards developed in the Federal Circuits and State Appellate courts?

2. Does a local government have the unfettered right to "rely" on out of date and irrelevant pre-enactment legislative data to impose limits on the operation of First Amendment protected businesses that would ultimately result in the demise of the businesses and the loss of all such protected speech within an entire urban county, in direct conflict with this Court's decision in *City of Los Angeles v. Alameda Books*?

PARTIES TO THE PROCEEDINGPARTIES TO THE PROCEEDING

The Petitioners, who were Plaintiffs in the trial court, and Appellants in the Illinois State Apellate Courts, are XLP Corporation, an Illinois Corporation, Michael Christofalos, President, d/b/a "Dancer's," and Danny Christofalos, d/b/a/"Baby Dolls."

The Respondent is the County of Lake, a political subdivision of the State of Illinois, the Defendant in the trial court, and the Appellee in the State Appellate forums.

All parties to the proceedings below are parties to this Petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Counsel for the Petitioners informs this Court that no party corporarte entitiy has any parent, and no publicly owned company holds any ownership interest in the corporations.

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OPINIONS BELOW

The Opinion of the Illinois Appellate Court, Second Judicial District, dated May 26, 2005, and published as modified on July 8, 2005, 295 Ill.Dec. 329 (Ill. App. 2005) is reproduced at Appendix A to this Petition. The Order of the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, dated November 25, 2003 is reproduced at Appendix B.

JURISDICTION

The Illinois Appellate Court, Second Judicial District, entered its Opinion on May 26, 2005, and Petitioners filed a Notice of Intent to File Petition for Leave to Appeal with the Illinois Supreme Court on June 16, 2005. Petitioners filed said Petition for Leave to Appeal with the Illinois Supreme Court, which highest state court declined to exercise discretionary jurisdiction on December 1, 2005. (App. C). This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions

The First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech . . ."

Statutory provisions

The County of Lake adopted a Comprehensive Adult Entertainment Ordinance, 6:1-15, which regulates every permutation of the operation of all businesses deemed to provide "adult entertainment" in the County. The provisions of that Ordinance are reproduced as Appendix D.

STATEMENT OF THE CASE

Petitioners, XLF Corporation, an Illinois Corporation, Michael Christofalos, as President of XLP, d/b/a "Dancer's," and Danny Christofalos, d/b/a/ "Baby Dolls," sought a discretionary appeal from the highest Illinois State Court, seeking review of the decision of the Appellate Court, Second Judicial District, affirming the judgment entered by the Circuit Court of Lake County, Illinois. The Appellate Court, Second District, rendered its decision on Petitioners' appeal from the judgment and order of the Circuit Court, which rejected all

assertions of First Amendment violations (all brought pursuant to 42 U.S.C. Section 1983) resulting from the imposition of County legislation alleged to be in direct violation of Plaintiffs' Federal Constitutional rights, and resolved all issues in favor of Lake County. In compliance with Rule 14.1(h), Petitioners state that the issues of "Federal Question" stature were the core issues in the case from its inception, as well as the core issues in all appellate review. The "Federal Questions" formed the basis of all judicial determinations made in the actions involved.

The decision of the Appellate Court was rendered on May 26, 2005. No petition for rehearing was filed. That decision, designated as a Rule 23 Order under Illinois procedural rules, is reproduced as Appendix A. The Petitioners' thereafter filed a Notice of Intent to File Petition for Leave to Appeal, and subsequently filed their Petition for Leave to Appeal, which was denied by the Illinois Supreme Court on December 1, 2005. On the basis that the highest state court declined discretionary review, the instant Petition for Writ of Certiorari is directed to the Illinois Appellate Court, Second Division, in conformity with the directives of 28 U.S.C., Section 1257.[1]

A. The Factual Background Supporting Review

As stated by the Second District Appellate Court (hereinafter "Appellate Court") in their Rule 23 Order:

> "In 1998, Lake County enacted an ordinance regulating adult uses. See Lake County Ordinance 6:1–15 (eff. February 10, 1998). In response to a court decision that called into question the constitutionality of the ordinance (see *Wisconsin Vendors, Inc. v. Lake County*, No. 99–C–8340 (N.D. Ill. 2003)), it was amended in 2001 (see Lake County Ordinance 6:1–15 (eff. October 9, 2001)). The purposes of the ordinance and its amendment were set forth by the county in preambles to the two enactments. The preamble to the original

1. See *Sullivan v. Texas*, 207 U.S. 416 (1908); *Hammerstein v. Superior Court*, 341 U. S. 491, 492 (1951); *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157, 160 (1954); and *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n. 1 (1968).

ordinance contains an extensive statement listing problems that the county board found were caused by adult uses, including crime, the deterioration of residential neighborhoods, the stability of nearby commercial and business uses, a "dehumanizing and distracting influence" upon young people, and the spread of diseases.

"The ordinance set forth a number of conditions pertaining to adult businesses. Among its provisions are the following: (1) adult uses must obtain a license; (2) establishments may only operate from noon to midnight; (3) establishments must close on Sundays and State holidays; (4) employees are forbidden from appearing nude; (5) straddle dances are prohibited, and; (6) exterior signs are limited 32 square feet. Adult cabarets are subject to additional restrictions, including: (1) performances are limited to a stage raised at least 18 inches above the patron seating area and separated from it by eight feet; (2) the establishment must be lit such that all items within it are plainly visible; (3) dancers are forbidden from receiving tips directly from customers; (4) tips must be placed in a receptacle after the completion of the performance, and; (5) no person under the age of 21 is allowed on the premises.

"In response, plaintiffs, who operate two adult cabarets in Lake County, initiated the instant action, alleging violations under their rights under the First and Fourteenth Amendments of the United States Constitution. U.S. Const., Amendments I, XIV. The cause proceeded to a bench trial, following which the circuit court entered judgment in defendant's favor on all the issues raised . . ."

The Appellate Court did not go directly into the facts of the bench trial, but the following critical facts are relevant to this Court's consideration.[2]

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2. Normally, this Court seldom delves into state court's findings of facts, but there is an exception "where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support

(Cont'd)

Based entirely on this Court's discerned directives in *Alameda Books*, in demonstrating that there was no basis for the enactment of an ordinance containing the kinds of restrictions found in the challenged ordinance, Petitioners introduced the direct testimony of Co-Counsel for the County, the individual who participated as a consultant in the adoption of the challenged legislation that the "legislative predicate" for the adoption of the original legislation was insufficient, as reflected in the minutes of the County Meeting of February 10, 1998, where there is ***no*** mention or any reference at all to ***any*** evidence being presented to the Board.[3]

It was later established that during the adoption of the "amendatory" ordinance, adopted on October 9, 2001, the County's record contained only oblique references to a generalized concern with "the types of secondary effects," occurring locally and "across the country." After showing that the amendatory ordinance was adopted only the basis of a general description of various criminal activities, and only very general descriptions of "brief examples" of foreign "studies,"

(Cont'd)

it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass on a Federal question, to analyze the facts." *Fiske v. Kansas*, 274 U.S. 380, 385-86, (1927). And *see Creswill v. Knights of Pythias*, 225 U.S. 246, 261 (1912); *Sterling v. Constantin*, 287 U.S. 378, 398 (1932). Pursuant to the second exception mentioned in the *Fiske* opinion, the Court frequently makes independent examination of facts that are intermingled with legal conclusions when necessary to determine whether a person has been deprived by a state court of a right secured by the Constitution. This exception has been consistently embraced where the First Amendment is concerned, as set forth in *Jacobellis v. Ohio*, 378 U.S. 184,189(1964) (the Court's "duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case . . . has been particularly true where rights have been asserted under the First Amendment guarantees of free expression.") *See also New York v. Ferber*, 458 U.S. 747,774 n. 28 (1982); *Miller v. California*, 413 U.S. 15, 25 (1973).

3. This issue is again an issue in conflict, as identified in the 11th Circuit decision in *Peek-a-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), *cert. den.*, 541 U.S. 988, (2004), where the Court embraced empirical evidence showing the absence of secondary effects, and *SOB v. County of Benton*, 317 F.3d 856 (8th Cir. 2004), where the Court rejected the submission of virtually identical evidence.

quoted from the minutes of the hearing ***only*** as, "Studies have been done literally all over the country from Houston and Phoenix, and Indianapolis, City of Tucson, City of Garden Grove . . . ," it was established that the "legislative predicate" for the amendatory ordinance was sparse. As direct examination continued, the Circuit Court did not allow any inquiry into what components or conclusions of which "studies" supported the various aspects and restrictions contained in the 2001 ordinance, or, specifically, how the "weight of the evidence in the record ***shows a nexus*** between the ordinance and the harm it seeks to alleviate":

> "Q: As far as studies that you reviewed and referred to in your addressing the Council, what particular study focused on any issues involving the hours of operation of any of the studies that you stated to the Board, what particular study talks about hours of operation as compared to the provision in the ordinance that limits the hours of operation from 12 a.m. to 12 noon, prohibits (opening) on Sunday and any legal holiday?
> "Mr. Jasica: Objection.
> "The Court: Sustained . . .
> "Q: Do you recall any of those studies providing any data or support for the restriction on age limitations in adult cabarets?
> "Mr. Jessica: Same objection.
> "The Court: Objection sustained."

Ultimately, the Circuit Court allowed no exploration into what aspect of what study supported any specific restriction contained in the challenged legislation. Also problematic, and clearly misperceived by the Appellate Court, was the fact that there was no evidence that ***any*** member of the County Council had ever actually seen any "study" or reviewed any of the two-page summary provided by the Chief of Police, since the minutes themselves show that County Council's commented on their "packets" ***missing*** any of the referenced materials.

Having identified the Assistant County Attorney's oblique reference to "secondary effects," and descriptions of some communities where studies had been done, without going any deeper into when, where, how or why the studies were

conducted or what conclusions the studies actually reached, the only other "legislative predicate" was a summary that spanned over 21 years, included establishments that had long been closed, and also included one murder and one situation where "sweating dynamite" was found on the roof of a totally unrelated establishment that closed in 1981, according to the Chief of Police's own testimony in trial.

The Petitioners put on an expert in dance and anthropology who testified that the performance restrictions contained in the legislation would impede the communicative quality of the subject performances, conveying the opposite message of "coldness, impersonality, dislike and distrust." In her opinion, the expressive activities presented at Petitioners' adult businesses caused no adverse secondary effects. Dancer Diana Lancaster, who performed at one club, testified that she certainly communicated with customers while performing her dances. It was important to her performance that she be able to look her customers in the eye, which is one of the ways in which a dancer communicates with customers. Creating the barriers required by the amendments to the adult business ordinance would destroy those important aspects of the ability to communicate.

Bruce McLaughlin, a land use planning and local government consultant, testified that he performed extensive research into whether adult businesses cause adverse secondary effects, including a review of several of the studies purportedly relied upon by municipalities to support that claim. Those studies were shown to ***not*** actually support the claim that adult businesses providing erotic entertainment cause adverse secondary effects. They neither caused property values to decline, nor were they linked to an increase in crime. One of the most recent studies conducted by the police department of Fulton County, Georgia specifically demonstrated that adult businesses caused no harm to the community.

McLaughlin testified that a report regarding the extent to which police have been called to the vicinity of adult businesses was meaningless, because it made no comparison with similar calls to non-adult businesses. The data submitted

by police apparently attempted to relate the number of crimes which had occurred during a period of several years at the various adult businesses located in Lake County. One of the groups of "contacts, " between police and adult businesses, listed as a "business check extra patrol," merely referred to instances where a police officer visited a location in question just to check to see what was going on. This does not indicate any criminal or untoward conduct. Further, the study by the police in Lake County indicated a de minimus number of calls to such businesses. It averaged out to ***two calls per business per year,*** which was an indication that there were no adverse secondary effects associated with the businesses actually existing in Lake County.

Petitioner Michael Christofalos testified that he was the sole owner of XLP corporation, operating an adult club named "Dancers," which had been in operation since 1983. The club was open from 7:00 to 3:00 a.m. during the week and 7:00 to 4:00 a.m. on the weekends. It did not serve alcoholic beverages. The busiest hours of the club were from 11:00 p.m. to closing, which translated to the period of time when the greatest quantity of expressive activity took place. The proposed amendments to the Lake County adult use ordinance would prohibit the club from operating past midnight on any day. Petitioner testified that requiring the club to close at midnight would deprive it of 75% of its revenue. Equating to 75% of the "speech" actually presented for patron appreciation.

He also testified that the internal configuration requirements in the amendments to the adult ordinance would materially interfere with the ability of patrons in his club being able to observe dancers and would eliminate 75% of the seating area in the club. In totality, the amendments to the ordinance would not allow his business to continue to operate.

Petitioner Danny Christofalos, operator of the only other adult dance cabaret in Lake County, "Baby Dolls," testified that he acquired ownership of that club in 1996. He also testified that limits on the hours of operation of the business and the internal configuration and performance restrictions would destroy 75% or more of his patronage, and constructively result in the closure of the business.

The County put on a land use planner, who did no empirical study and based his testimony only on interviews with various Village officials and business people. None of this data was ever presented to the Lake County Council in connection with the adoption of the ordinance or its amendments. The Planner never ventured in any adult business establishment in Lake County, and therefore had no knowledge of what occurred within them.

The County also presented the testimony of Dr. Eric Damian Kelly, who held a Masters degree in Civic Planning and a Ph.D. in Public Policy. He testified that he had conducted studies on what municipalities may "permissibly" do in regulating adult businesses. He visited the adult businesses involved in this litigation. He reviewed the ordinance and its amendments and certain background studies, as well as critiques of those studies. He disagreed with McLaughlin's analysis of the various reports from other municipalities. In his opinion, the studies from other municipalities which were identified as having been obliquely summarized to the Lake County Council were "largely reliable" which, in his opinion, were data upon which a municipality may rely in enacting zoning and land use regulations in connection with adult uses.

Dr. Kelly admitted, however, that none of the studies established ***causation of adverse secondary effects*** by adult businesses. He made no presentation to the Lake County Council in connection with its adoption of its adult business ordinances, but only reviewed materials in connection with that action after the fact. He did not know what material was actually presented to or relied upon by the Lake County Council in adopting the ordinance or its amendments. In his opinion, he could not conclude that the statistics presented by the Lake County Sheriff demonstrated that adult businesses caused adverse secondary effects any greater than any other business. He could not find anything in any of the material supposedly reviewed by the Lake County Council which would specifically support restricting the hours of operation of adult businesses, or restricting dancers to be over 21 years of age.

Richard Eckenstahler, Chief of Operations for the Lake County Sheriff's Office also testified on behalf of the County. He recounted some anecdotal information about events he had recalled in and around some adult businesses in the county, most of whom were no longer in existence. He also recounted one undercover operation at "Dancer's," and another undercover operation at "Baby Dolls," in December, 1999, where two dancers were arrested. He described a handful of other general police activities at the facilities. Chief Eckenstahler described the report he had prepared and presented to the County Council in support of the amendments to the adult business ordinance which summarized and described police calls to adult businesses between 1979 and 2001. This " Defendant's Exhibit "3" showed 202 police reports and 405 "incidents" ***between 1979 and 2001*** "connected" with adult businesses. These included all ***calls of any kind which brought police to the location and resulted in a report being prepared.*** His report did not include any information by which the members of the Council could make a comparison between alleged criminal activity at adult businesses and non-adult businesses. This was the only information he presented to the County Council to support the amendments to the adult business ordinance. He admitted that, other than his opinion, there was no "hard data" that showed that adult businesses caused more criminal activity and calls for police intervention than any other business.

The Chief also admitted that ***there was no evidence of which he was aware that showed that the amendment to the ordinance prohibiting nude dancing would decrease crime in any way.*** Over 21 years, for 14 different locations of adult businesses, his report showed the following numbers of serious crimes: 6 armed robberies; 13 assaults; 19 thefts; 46 batteries; 11 instances of criminal damage to property. Over that time, there were only 10 instances of disagreements between management and patrons; 8 incidents of drug and/or alcohol overdoses; and two cases of sexual assault. The Chief had no information as to how many of these incidents resulted in any convictions for criminal activity, because he was "just looking at criminal activity at these establishments."

In comparison to the ***six*** arrests for prostitution and soliciting at the two adult businesses involved in this case over the ***21 years*** of the research, statistics from the Lake County Circuit Court showed that, for a little less than ***4 years*** in the County itself, there were ***88*** charges of prostitution brought in the County in 2000, ***191*** in 2001, ***69*** in 2002, and ***99*** in 2003, through the end of October. This evidence was excluded by the Circuit Court for alleged "discovery violations," even though the existence of and procurement of these records was accomplished only days earlier.

During his testimony, the Chief also described a "study" done by the police after the enactment of the amendments to the adult ordinance, between 2000 and mid-2003, which attempted to compare police calls to adult businesses as opposed to calls to other businesses. These reports of incidents included such things as "suspicious persons," and "suspicious vehicles." He described a suspicious vehicle as a situation in which a police officer was required to a location because the vehicles were "not there for the right reasons." From these reports, he concluded that there was a greater "overall amount of criminal activity" at the adult businesses than at the other businesses included in the study, though there was no empirical or comparative analysis of this data undertaken.

On cross examination, the Chief admitted many of the calls to adult businesses ***had nothing to do with the kind of entertainment being offered there,*** such as an altercation between two patrons who had a disagreement. He admitted that an arson he remembered at one adult club was only one of between 10-15 which occurred during that year, all the rest having been at locations having nothing to do with an adult business. Other officers testified about other infrequent, generalized problems, but with no comparisons being made to any other types of businesses.

B. The Trial Court's Erroneous Conclusion Were Embraced By the Appellate Court Because There Is No Clarity In What Type of Evidence May Support What Type of Restriction

At the conclusion of all of the evidence, the Circuit Court ruled in favor of the County. He concluded that the restrictions

on tipping were valid because customers had alternate ways for patrons to show their appreciation for the dancers' performance. The Court ruled that the "rational basis" test was to be applied to an analysis of the ordinance, which the Court stated to be, the act must be upheld, as long as there is any reasonable conceivable state of fact showing that act is rational, citing, not a case involving the First Amendment, but a tax case. He ruled that the Plaintiffs had not "negated every conceivable basis supporting the restrictions and that the restrictions at least for the purpose of the equal protection challenge, and in fact the evidence presented here, establishes the restrictions are rationally related to the County's stated purposes," but he did not state how the interior restrictions on the business have any impact on the exterior issues or generic and infrequent problems that made up the County's evidence. He found the Ordinance to be content neutral and, with no evidentiary basis whatsoever, concluded that the evidence relied upon by the County Council in enacting the amended ordinance could reasonably be believed to be relevant to the problem of secondary effects and that the evidence fairly supports the county's rationale. The State court never reduced its verdict to writing.

The reference to studies from other municipalities which had not been considered by the County Council in adopting the amendments to the Ordinance and the opinion of the Chief that adult businesses cause more crime than other businesses "more than supports a theory justifying the ordinance," thus apparently outweighing the empirical evidence introduced by Plaintiffs attacking the rationale for the enactment of the ordinance. It was from this that the appeal was brought before the Appellate Court.

The critical issue was that, ***even if taken at face value***, the sparse and generic generalized concerns that the legislation ***may*** have been based on, did not have any "rational relationship" to the ***restrictions*** imposed by the legislation. In the Rule 23 Order *sub judice*, the nebulous state of this area of the law apparently allows a local government to believe that, for example, depriving exotic dancers from receiving tips would somehow eliminate cars from being burglarized or

dynamite being thrown on the roof. Amazingly, the Court states, "At this point we find that the weight of the evidence in the record ***shows a nexus*** between the ordinance and the harm it seeks to alleviate." (Emphasis added).

While the Appellate Court's Order summarizes much of the remaining expert and non-expert testimony, one critical fact that was not addressed in the Rule 23 Order was the following issue raised by Petitioners' Counsel in opening statement, referring to the *Alameda Books* case:

> "Justice Kennedy says one thing. He says that you cannot decrease the amount of speech in an effort to address the asserted secondary effects of the ordinance. And Judge, the two cabarets that are before this court are so small that if we are to look solely at the imposition of this eight-foot restriction, irregardless of the First Amendment, but solely as the imposition of the impact it has on the operation of these businesses, and essentially what it would do, is, it would put numerous employees out of business. There's no way that businesses can survive, because there is no viability left of them after the imposition of these restrictions..."

The Appellate Court disregarded this issue, totally glossing over the testimony from Petitioners that the imposition of the regulations at issue ***would put the only exotic dance businesses in the County out of business.*** The Appellate Court did not identify, and truly did not hear any rebuttal or contradictory evidence showing that the challenged legislation did not "significantly decrease the quantity of speech," and did not address this important issue in its Rule 23 Order. The nebulous nature of this area of the law apparently supports a finding that requiring the businesses to have a license, slashing hours of operation, eliminating any expressive nudity, limiting exterior signage, prohibiting tipping, and prohibiting anyone under the age of 21 from entering or performing in the subject establishments would apparently decrease the incidences of "suspicious vehicles," burglaries, damage to property, employee/customer disputes, events of fire or arson, obscenity cases, thefts, threatening phone calls and harassment, trespassing events, weapons charges, and a cornucopia of other

sporadic and infrequent criminal acts, ***all of which were already criminalized and punishable under existing Illinois legislation, and none of which had been statistically compared to any non-adult facility,*** and, as established before the Circuit Court, and noted by the Appellate Court, clearly showed that such raw statistical data, "*... did not establish that the reported crimes were actually connected to the adult business as opposed to something else in the area,*" as testified to and conceded by expert witnesses on both sides. No legislative effort to prevent so called secondary effects can be valid if it ends up eliminating ***all*** sources of the protected speech at issue.

REASONS FOR GRANTING THE PETITION

This case presents an important and critical question regarding issues that have both confused and tortured courts at every level of state and Federal judiciaries ever since this Court's fractured decision in *City of Los Angeles v. Alameda Books, supra,* and the statements made therein regarding what analytical framework and what type of evidentiary burden must be shouldered by a local government in adopting and defending legislation that directly impinges on the exercise of fundamental First Amendment rights and imposes regulatory and operational restrictions that, under the guise of being adopted to address the alleged "adverse secondary effects" purportedly caused by the adult businesses sought to be regulated, ultimately results in the annihilation of those businesses.

This case is about one of the most precious aspects of the First Amendment: at what point can the government impose "censorship under the guise of legislation." This goes to the core fundamental right of citizens to choose what type of entertainment they wish to partake of without unjustified governmental interference or the total elimination of First Amendment freedoms. The Petition involves each of the factors listed in this Court's Rule 10 that guide this Court's decisions on granting certiorari review. The decision of the Illinois Appellate Court is in direct and irreconcilable conflict with decisions of this Court, the questions presented identify a critical conflict among the federal circuits, and both state and federal courts across the Nation have cried out for

clarification of the Byzantine framework that this Court's recent fractured decisions on adult entertainment legislation have created.[4]

Of equal importance, the Illinois State Court has decided a significant question of federal law, arising under the Free Speech Clause of the First Amendment, that has been consistently interpreted in different ways by multiple state and federal courts, on critical issues that have not been clearly settled by this Court, but that cry out for resolution, a fact articulated by the state decision at issue herein, and repeated at every state and federal level, either explicitly, or by implication, brought about by differing and irreconcilable opinions from the various courts dealing with the issue.

It is of the utmost constitutional importance that this Court grant the Petition. The Petitioners' speech may fall "only within the outer ambit of the First Amendment's protection," *Pap's A.M. v. City of Erie*, 529 U.S. 277, __, 120 S. Ct. 1382, 1391 (2000), but if "the price of liberty is eternal vigilance," as stated by the Framers of the Constitution,[5] then protecting those "outer perimeters" is crucial to the maintenance of Free Speech. The First Amendment is concrete evidence of our "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wideopen." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). But in Illinois today, and robustly evident throughout the Federal Circuits misconstruing or attempting to "fill in the blanks" of this Court's prior adult entertainment decisions, the right to free speech is in extreme danger.

Additionally, the legislation results in a decrease in both the quality and, most importantly, under this Court's decision in *Alameda Books*, the ***quantity*** (or very existence) of expressive conduct at issue. This case involves nothing less important than the First Amendment, and the decision sought to be reviewed in this Court, as set forth below, is worthy of consideration, if for no other reason than the confusion in this

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4. See *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000), *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, (2002), and *Barnes v. Glenn Theatre, Inc.* 111 S. Ct. 2456 (1991).

5. Attributed to Thomas Jefferson.

area of the law repeatedly complained about by the Illinois Appellate Court, a complaint indicative of virtually every court trying to fairly and consistently apply the Rule of Law to critical First Amendment issues.

I. The Illinois Appellate Court Decision Is In Direct Conflict With This Court's Decision In *City of Los Angeles v. Alameda Books* And Further Aggravates The Existing Split Of Authority And Confusion Interpreting This Decision The Seventh Circuit opinion is in direct conflict with decisions of other circuit courts on the requirements of *Freedman v. Maryland*

The legislation at issue herein results in a decrease in both the quality and, most importantly, under this Court's decision in *Alameda Books*, the ***quantity*** (or very existence) of expressive conduct at issue. This case involves nothing less important than the First Amendment, and the decision sought to be reviewed in this Court, as set forth below, is worthy of consideration, if for no other reason than the confusion in this area of the law repeatedly complained about by the Illinois Appellate Court, a complaint indicative of virtually every court trying to fairly and consistently apply the Rule of Law to critical First Amendment issues.

Petitioners initially ask this Court to resolve the conflict between the Second District Appellate Court and this Court, and also to clarify critical matters in a case that the Illinois openly complained, ". . . presents an issue that has ***often been litigated in the courts of this nation***: when and to what extent may the government regulate an adult use," virtually requesting clarification from this Court by acknowledging, ***"[R]esolution of this issue is complicated by court's inability to articulate a clear set of principles to govern cases such as these."***

Through this action, Petitioners hope to establish an unequivocally ***"clear set of principles,"*** and to establish an appropriate evidentiary framework for the Courts of Illinois, and every other court in the Country, to apply ***consistently*** and with ***precision***, as required by the barest modicums of both the equal protection doctrine and substantive due process. Petitioners also hope that this Court grants review to reconcile

the clear conflict between the Second District Appellate Court and the United States Supreme Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, (2002), and its state and Federal progeny. In stating that, "In short, guidance from the Supreme Court on this issue has been somewhat ***less than clear,***" the Illinois Appellate Court then begrudgingly states, "Therefore, ***we begin our analysis by setting forth the law as best we can derive it from applicable precedent,***" then complains about the, "*. . . **somewhat nebulous state of the case law** . . .*," virtually crying out, almost directly, for the necessity of this Court to enunciate a clear evidentiary standard, eliminating any question, and eliminating any "nebulous state of the case law" that would interfere with the consistent and properly guided evaluation of similar issues by the Courts of Illinois, and all Courts inevitably destined to evaluate similar arguments regarding the critical issues presented by the instant action.

Respectfully, Petitioners would submit that the instant scenario invites the invocation of this Court's clear responsibility to provide guidance and clarification when called upon to do so, an exercise of this Court's intervention made virtually inescapable by the even a cursory evaluation of the concessions and confusion identified by the Second District Appellate Court, and the other considerations of Rule 10, conflict among the state and upper and lower levels of the Federal judiciary, clear conflict among the Circuits, and conflict between the Circuit Courts and this Court, as articulated below. Coupled with the significant likelihood that the issues presented in the instant action will undoubtedly be capable of, if not certainly subject to, repetition, it is respectfully requested that this Court grant this Petition.

The ultimate principle is that, because of the First Amendment context in which this case is brought, the traditional burdens of proof are shifted. There is a presumption that any governmental restraint on expressive conduct is impermissible. *Southeastern Promotions Ltd. v. Conrad*, 420 US 546, 95 S. Ct. 1239 (1975). Once a party demonstrates that a regulation deprives it of protected freedom of expression, the burden shifts to the governing body to justify that

infringement. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803, 104 S. Ct. 2118 (1975).

From the earliest decisions dealing with the regulation of adult entertainment businesses, it was established that the legislation at issue could only be justified if it regulated or addressed a legitimate governmental interest, established by evidence showing the existence of problems that would be favorably addressed or prevent the so-called "adverse secondary effects" ***shown to exist***, allegedly engendered by adult entertainment establishments. *Young v. American Mini Theatres*, 427 U.S. 50 (1976), *Renton, supra.* A requirement of this concept was that the existence of these adverse secondary effects be ***established*** through competent, substantial evidence. *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985); *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982).

Early on, the courts recognized that there had to be some kind of "fit," some "rough proportionality," simply stated, a serious enough connection between the evidence adduced to show some ***need*** for the legislation, and the restrictions imposed by that legislation. Contrast these requirements to the Appellate Court's apparent conclusion that requiring the Petitioners' businesses to have a license, slashing hours of operation, eliminating any expressive nudity, limiting exterior signage, prohibiting tipping, and prohibiting anyone under the age of 21 from entering or performing in the subject establishments would apparently decrease the incidences of "suspicious vehicles," burglaries, damage to property, employee/customer disputes, events of fire or arson, obscenity cases, thefts, threatening phone calls and harassment, trespassing events, weapons charges, and a cornucopia of other sporadic and infrequent criminal acts. The current lack of guidance created by this Court's fractured Opinion in this area of the law allowed this type of evidentiary folly.

Indeed, in upholding the ordinance at issue in *Renton*, the Supreme Court held that, "the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities so long as whatever ***evidence*** the city

relies upon is reasonably believed to be ***relevant to the problem that the city addresses***." *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 53, 106 S.Ct. 925, 931 (1986) (Emphasis added).

In at least one Circuit, it was held that:

> "When a legislative body acts to regulate speech, it has the burden, when challenged, of showing either (1) that its actions serves a compelling state interest which cannot be served in a less restrictive way, or (2) that its actions serve a substantial content-neutral state interest . . . it must come forward with . . . evidence . . . justifying . . . reasonable time, place and manner restrictions on speech." *Phillips v. Borough of Keyport*, 107 F.3d 164, 172-173 (3rd Cir. 1997).

The case of *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000), only cited by the Appellate Court as a source of confusion, contained substantial language regarding the ***requirement*** for an adequate "predicate," but, in no way, did the case do anything but strengthen the Supreme Court's recognition and respect for "as-applied" challenges to the application of restrictive legislation:

> "Here, Kandyland has had ample opportunity to **contest** the council's findings about secondary effects before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking. ***In the absence of any reason to doubt it***, the city's expert judgment should be credited." *Id., Justice O'Connor, joined by Justices Kennedy, Rehnquist, and Breyer.* (Emphasis added).

Of dramatic additional importance to the instant case is also the Opinion of Justice Souter. To put this statement in context, Justice Souter apparently felt that governments had a minimal burden in supporting restrictive adult use legislation, as articulated by his concurrence in *Barnes v. Glen Theatre*, 501 U.S. 560, 111 S.Ct. 2456, 2470 (1991), wherein he stated, in addressing the concept of "legislation seeking to combat the secondary effects of adult entertainment":

"I do not believe that a state is required affirmatively to undertake to litigate this issue in every case." *Id.*

In the *City of Erie* decision, however, Justice Souter's opinion, which was critical to reach a coherent majority in both the *Barnes* and *Erie* cases, evinced a ***complete*** change in his position:

"The proposition that the presence of nude dancing establishments increases the incidence of prostitution and violence is amenable to empirical treatment, and the ***city councilors who enacted Erie's ordinance are in a position to look to the facts of their own community's experience as well as to experiences elsewhere.*** Their failure to do so is made all the clearer by one of the amicus briefs, largely devoted to the argument that ***scientifically sound studies show no such correlation.*** See Brief for First Amendment Lawyers Association as Amicus Curiae 1623; *Id.*, at App. 129." (Emphasis added).

In light of these authorities, the most critical consideration in the instant action is simply whether the woefully inadequate oblique statements regarding concerns with crime and generalized descriptions of other communities where studies have been conducted, coupled with the two-page document produced by the Chief of Police, showing, if nothing else, that the 14 businesses studied over 21 years were relatively problem free and resulted in a handful of criminal issues ***almost totally unrelated to the restrictions contained in the challenged legislation,*** actually showed a need for the specific provisions of the legislation.

Prior to this Court's fractured decision in *Barnes, City of Erie,* and *Alameda Books,* it was a fundamental concept of statutory construction to make sure that the restrictions imposed by the legislation were actually supported by the evidence trying to establish the existence of an otherwise unremediated governmental interest. See *Basiardanes v. City of Galveston,* 682 F2d 1203, 1213 (5th Cir. 1982). Every Ordinance required the Court:

"... To examine the strength and legitimacy of the governmental interest behind the ordinances and the

precision with which the ordinance is drawn. Unless the ordinance ***advances*** significant governmental interests and ***accomplishes*** such advancement without undue restraint of speech, the ordinance is invalid." *Basiardanes* at 1214, citing *Schad v. Borough of Mt. Ephraim,* 101 S.Ct. at 2183-2184. (Emphasis added).

The Court's recent decisions provide no such clarity in justifying the granting of this Petition to eliminate the confusions and conflicts caused in this important area of the First Amendment.

II. This Court's Fractured Decision Have Created Irreconcilable Conflicts Within The Federal Circuit Courts

In Alameda Books, this Court tried to articulate the right of adversely affected parties challenged the findings made in legislation that seldom accomplished more than destroying the First Amendment right of adult entertainment businesses:

"In *Renton,* we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may ***rely on any evidence*** that is "***reasonably*** believed to be ***relevant***" for demonstrating a ***connection*** between speech and a substantial, independent government interest. 475 U.S., at 51- 52, 106 S. Ct. 925; *see also, e.g., Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 584, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (SOUTER, J., concurring in judgment) (permitting municipality to use evidence that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects). ***This is not to say that a municipality can get away with shoddy data or reasoning.*** The municipality's ***evidence must fairly support*** the municipality's rationale for its ordinance. ***If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in Renton. If***

> ***plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.*** *See, e.g., Erie v. Pap's A.M.*, 529 U.S. 277, 298, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (plurality opinion)." (Emphasis added).

Even harsher was the dissenting opinion authored by Justice Souter, joined by Justices Stevens, Ginsberg, and Breyer. Quite candidly, Justice Souter essentially stated that the "empirical studies" that the other Justices believed could be asserted "at trial," should be asserted as a prerequisite to the adoption of any such legislation. Presumably, when this Court says that the evidence must support the rationale, what is hopefully stated is that the restrictions contained in challenged legislation must in some way favorably address whatever problems the government establishes by referring to specific evidence in the adoption of that legislation. Recent decisions at every level of the judiciary, based on the failure of this Court to clearly articulate a specific evidentiary standard, hopefully requiring local government to "articulate and support" well reasoned evidence with the specific evidence supporting the specific restrictions imposed, has created a morass in this area of the law.

No area of the law has caused more confusion, or second guessing by lower Courts than Supreme Court interpretation of the application of fundamental First Amendment Jurisprudence upon Adult Oriented Businesses. *Bradley J. Shafer & Andrea E. Adams, First Amendment Law, Jurisprudence Of Doubt; Obscenity, Indecency and Morality at the Dawn of the 21st Century,* 84-JUN Mich.B.J. 22 (2005). Specifically, when a city or municipality enacts a zoning ordinance that regulates the location of adult entertainment businesses, First Amendment Jurisprudence becomes even more opaque. It is highly questionable whether adult oriented establishments have fairly been accorded the full protections of the First Amendment. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566 (1991) (Nude dancing can consist of "expressive conduct within the outers perimeters of the First Amendment, though

[the Court] view[s] it as only marginally so." *Barnes*, 501 U.S. at 566). Local governments, however, have little, if, no guidance as to how to justify the regulation and their infringement upon free speech and expression of Adult Establishments in an effort to minimize or contain the perceived "secondary effects" generated by virtue of their operation. *Mindi M. Jelsema, Note: Zoning Adult Businesses After Los Angeles v. Alameda Books*, 47 St. Louis U.L.J. 1117, 1118 (2003).

In *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, (11th Cir. 2003), the Circuit Court upheld a ban on public nudity and labeled the legislation a "constitutional orphan" rejecting any evidentiary analysis under *Barnes*. This decision is directly in conflict with *Peek-A-Boo, supra.*, in that the circuit court demanded an in depth analysis of the empirical evidence put forward by the affected businesses, that successfully challenged the findings upon which the legislation was based. *Peek-A-Boo* is in direct conflict with *SOB v. Benton, supra.*, which rejected the analysis of any empirical evidence and gave total deference to the government's findings.

In *Center for Fair Public Policy, et al. v. Maricopa County, Arizona*, 336 F.3d 1153 (9th Cir. 2003), the Ninth Circuit held up a ban on adult businesses operating during late night hours which was not predicated on any pre-enactment evidence of an empirical nature, and was simply based on generalized anecdotal evidence. This type of data was found insufficient in the *Peek-A-Boo* case.

In *Heideman, et al. v. South Salt Lake City*, 348 F.3d 133 (10th Cir. 2003), the Court articulated the problem identified herein:

> "The district court's reluctance to elaborate the law applicable to nude dancing is understandable. Twice in the past fifteen years, the United States Supreme Court has considered the constitutionality of ordinances banning commercial nude dancing under the Free Speech Clause, and both times the Court produced fractured decisions with no majority opinion and no clear statement of controlling doctrine. * 1185 *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L. Ed. 2d 504 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277,

120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000). This is because, as discussed below, it is far from clear how prohibitions of nude dancing "fit" within the conceptual structure of First Amendment law. [FN2] Despite the theoretical uncertainties, however, the results themselves in these cases have been consistent: the practitioners of nude dancing have lost and the ordinances have been upheld.

"FN2. The best account of the theoretical difficulties may be found in Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 *Wm. & Mary L.Rev.* 611 (1992)" *Id.* at 1184-85.

In *N.W. Enterprises, et al. v. City of Houston*, 352 F.3d 162 (5th Cir. 2003), the Court was even unaware of changes in controlling precedent when it upheld the challenged legislation in that case:

"As Justice Souter observed: "Given our recognition that 'society's interest in *Barnes*, 501 U.S. at 584-85, 111 S. Ct. at 2470 (Souter, J., concurring); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-98, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (O'Connor, J., opinion joined by Rehnquist, C.J., Kennedy and Breyer, JJ.) (city can rely on the evidentiary foundation found in other Supreme Court cases regarding secondary effects); *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, at 291 (5th Cir.2003) (opinion on reh.) (where a predecessor ordinance was sufficiently supported to apply content-neutral review, same findings were sufficient to consider a subsequent ordinance content-neutral); *BGHA LLC v. City of Universal City, Texas*, 340 F.3d 295 (5th Cir.2003)." *Id.* at 176.

N.W. Enterprises went into some depth discussing other adult entertainment decisions, none of which articulated a consistent level or evidentiary review:

"This line of case fulfills *Renton*, which, while reiterating that legislators' subjective motivations alone cannot condemn an otherwise constitutional statute, cited as sufficient the purpose of the city's ordinance. *Renton*, 475 U.S. at 48, 106 S.Ct. at 929, quoting *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S.Ct. 1673, 1683, 20

L.Ed.2d 672 (1968). Because that ordinance's expressed purpose was to " 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views," *id.*, the Court deemed it content-neutral.

"FN4. *See, e.g., Encore Videos, Inc. v. City of San Antonio,* 330 F.3d 288, 291 (5th Cir.2003)(treating ordinance as content-neutral where this court had previously found that the city had specific evidence of secondary effects); *LLEH, Inc. v. Wichita County, Tex.*, 289 F.3d 358, 368 (5th Cir.2002) (finding adequate evidence that county's predominant concern was reducing secondary effects where legislature gathered evidence of secondary effects related to SOBs and the measures taken by other legislatures); *Lakeland Lounge of Jackson, Inc. v. City of Jackson,* 973 F.2d 1255, 1258-59 (5th Cir.1992) (analyzing SOB ordinance as content-neutral where the city council made findings supported by evidence that SOBs have harmful effects on the community).

"FN5. The district court appears to have misread *SDJ,* as it cited two paragraphs of that opinion dealing with the third *Renton* inquiry, transposing an inapposite discussion to *Renton*'s content-based/content-neutral second inquiry. *See N.W. Enters., Inc.*, 27 F.Supp.2d at 777 (citing *SDJ,* 837 F.2d at 1274). *SDJ* applied across-the-board intermediate scrutiny to Houston's ordinance without proof of efficacy under *Renton*'s second prong. *See* 837 F.2d at 1273.

"Further, the City need not demonstrate that the City Council actually relied upon evidence of negative secondary effects when it enacted 97-75. A local government can justify a challenged ordinance based both on evidence developed prior to the ordinance's enactment and that adduced at trial. *J & B Entm't, Inc. v. City of Jackson, Miss.*, 152 F.3d 362, 371-72 (5th Cir.1998) (*citing Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582, 111 S.Ct. 2456, 2469, 115 L.Ed.2d 504 (1991) (Souter, J., concurring)). This is because the "appropriate focus is

not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a *current governmental interest* in the service of which the challenged application of the statute may be constitutional." [FN6] *Barnes*, 501 U.S. at 582, 111 S.Ct. at 2469 (Souter, J., concurring)." *Id.* at 174-175.

In *G.M. Enterprises v. Town of St. Joseph, Wisconsin*, 350 F.3d 631 (7th Cir. 2004), the Court found that the continuing format of allowing dancing in a facility that sold alcoholic beverages was not even an issue of First Amendment dimensions. This determination is directly in conflict with the Eleventh Circuit decision in *Flanigan Enterprises v. Fulton County, Georgia*, 242 F.3d 976 (11th Cir. 2001). In *G.M. Enterprises*, the Court did not even accurately state the *Alameda* holding and is totally irreconcilable with the *Peek-A-Boo* decision:

"The issue before this Court is what quality and quantum of evidence a ***639** regulating body must consider in order to demonstrate that it has a reasonable basis for believing that the regulated activity generates adverse secondary effects, the reduction of which is a "substantial government interest" under the *Renton* or *O'Brien* tests. This issue was most recently before the Supreme Court in ***Alameda** Books;* in the plurality's words, the case required the court to "clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton*." ***Alameda** Books*, 535 U.S. at 433, 122 S. Ct. 1728. In ***Alameda** Books*, the plurality reaffirmed that "a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." ***Alameda** Books* at 438, 122 S. Ct. 1728, (quoting *Renton*, 475 U.S. at 51-52, 106 S. Ct. 925). The plurality upheld an ordinance that prohibited the operation of multiple adult entertainment business in the same building, even though the regulating body did not rely upon a study

that specifically addressed whether the concentration of such establishments in a single building would result in a higher incidence of adverse secondary effects. *Id.* at 437, 122 S. Ct. 1728. According to the plurality, it was reasonable for the regulating body to infer-from a somewhat dated study that concluded that the concentrated growth of adult entertainment establishments in a particular neighborhood led to increased crime there-that the concentration of adult establishments in a single building would lead to a similar increase in crime. *Id.* at 435-38, 122 S. Ct. 1728. The plurality did not require that a regulating body rely on research that targeted the exact activity it wished to regulate, so long as the research it relied upon reasonably linked the regulated activity to adverse secondary effects." *Id.* at 639.

In *RVS, L.L.C. v. City of Rockford*, 361 F.3d 402, (7th Cir. 2004), the decision issued was in conflict with the above specified decisions

"At this stage, courts are "required to ask 'whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance.'" *Ben's Bar*, 316 F.3d at 724 (quoting ***Alameda*** *Books*, 535 U.S. at 441, 122 S.Ct. 1728). In other words, simply stating that an ordinance is designed to combat secondary effects is insufficient to survive intermediate scrutiny. The governmental interest of regulating secondary effects may only be upheld as substantial if a connection can be made between the negative effects and the regulated speech. In evaluating the sufficiency of this connection, courts must "examine evidence concerning regulated speech and secondary effects." ***Alameda*** *Books*, 535 U.S. at 441, 122 S. Ct. 1728. According to the ***Alameda*** *Books* plurality, the evidentiary requirement is met if the evidence upon which the municipality enacted the regulation "is reasonably believed to be relevant for demonstrating a connection between [secondary

effects producing] speech and a substantial, independent government interest." 535 U.S. at 438, 122 S. Ct. 1728 (internal quotations omitted).

. . .

"As we move to the second question, we are confronted with a critical deficiency of the Ordinance-the lack of evidence to support this premise. The record is devoid of evidence connecting Exotic Dancing Nightclubs and the secondary effects that allegedly motivated the Ordinance's adoption. While it seems apparent that the Ordinance will have the effect of reducing the availability of speech, evidence is lacking to support the proposition that secondary effects will be reduced by the same degree, if at all.

. . .

"The Supreme Court has consistently held, "a city must have latitude to experiment, at least at the outset, and . . . very little evidence is required [to support an ordinance's proposition]." *Id.* As previously noted, "a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." ***Alameda*** *Books,* 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion) (quoting *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925). However, Rockford has produced little evidence of harmful secondary effects connected to Exotic Dancing Nightclubs beyond the assumption that such effects exist. While it is true that common experience may be relied upon to bolster a claim that a regulation serves a current governmental interest, the experience in this case falls short of satisfying the minimal evidentiary showing required by ***Alameda*** *Books.* Indeed, while courts may credit a municipality's experience, such consideration cannot amount to an acceptance of an "if they say so" standard." *Id.* at 414-415.

In *Worldwide Video v. City of Spokane,* 368 F.3d 1186 (9th Cir. 2004), on the basis of a woefully unimpressive

evidentiary collage that was thoroughly rebutted by the adult businesses the ordinance was upheld because of pornographic litter. The reasoning was again irreconcilable with *Peek-A-Boo*, and applied yet another evidentiary standard:

> "In sum, ***Alameda*** *Books* "does not affect [a municipality's] ability to rely on secondary effects studies and certainly does not mandate a trial in every case where a municipality does so." *Bigg Wolf Disc. Video Movie Sales, Inc. v. Montgomery County,* 256 F.Supp.2d 385, 393-94 (D.Md.2003). The evidence relied on by Spokane "is both reasonable and relevant," *Maricopa County,* 336 F.3d at 1168, and the City's regulatory regime "is likely to cause a significant decrease in secondary effects" at the cost of "a trivial decrease in the quantity of speech," ***Alameda*** *Books,* 535 U.S. at 445, 122 S.Ct. 1728 (Kennedy, J., concurring). Therefore, we hold that Spokane's reliance on this evidence was proper and that the Ordinances are narrowly tailored to address the City's legitimate concerns." *Id.* at 1198.

In *Jolener v. Village of Washington Park, Illinois,* 378 F.3d 613 (7th Cir. 2004), produced yet another analysis trying to extrapolate this Court's directives:

> "There are two distinct, yet overlapping, lines of Supreme Court jurisprudence addressing the degree of First Amendment protection afforded to adult entertainment, a particular type of expressive conduct. *Ben's Bar,* 316 F.3d at 712-13. One group of cases addresses public indecency regulations. *See Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991); *City of Erie v. Pap's A.M.,* 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000). The other considers adult entertainment zoning ordinances. *See Young v. Am. Mini Theatres, Inc.,* 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976) ("*AMT*); *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986); *City of Los Angeles v.* ***Alameda*** *Books, Inc.,* 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002). However, the analytical framework underpinning both strains of jurisprudence is rooted in *United States v. O'Brien,* 391

U.S. 367, 376-82, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). *Ben's Bar*, 316 F.3d at 714. Consequently, the Supreme Court has held that the distinctions between the test used to assess the constitutionality of public indecency statutes, *see Pap's A.M.*, 529 U.S. at 289, 120 S.Ct. 1382, and that used to evaluate adult entertainment zoning ordinances, *see Renton*, 475 U.S. at 46-47, 106 S.Ct. 925, are irrelevant. 316 F.3d at 714." *Id.* at 622.

Similar evidentiary confusion is present in *Déjà vu of Cincinnati, L.L.C. v. The Union Township Board of Trustees*, 411 F.3d 1153 (6th Cir. 2005), *Gammoh, et al. v. City of La Habra*, 395 F.3d 1114 (9th Cir. 2005), *JMM Corporation v. District of Columbia, et al.*, 378 F.3d 1117, (D.C. Cir. 2004), *Kentucky Restaurant Concepts, Inc., et al. v. City of Louisville, et al.*, 117 Fed.Appx. 415 (6th Cir. 2005), *Terminello v. City of Passaic, et al.*, 118 Fed.Appx. 577 (3rd Cir. 2004), and *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002).

Finally, as stated in *Peek-A-Boo*, the Court articulated much of the confusion present in this area:

"To guide our analysis, we begin with a comprehensive summary of the Supreme Court's jurisprudence in this area. The discussion is extensive, in part because of the large number of no-clear-majority decisions of the Court in cases of this type. Moreover, our task is complicated because although the Court has formulated distinct standards for evaluating the two kinds of regulation enacted by the County in this case-zoning ordinances and public nudity ordinances-the Court also has sometimes collapsed the two categories into a single, overarching category of regulatory action targeting the negative "secondary effects" of non-obscene adult entertainment and drawn conclusions about this single category. *See generally City of Los Angeles v. Alameda Books*, 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000); *Barnes v. Glen Theatre*, 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986). [**8] Additionally, the Court has

occasionally borrowed specific doctrines developed in one category of case to apply to the other. *See, e.g.*, [*1256] *Alameda Books, 122 S. Ct. at 1736* (plurality opinion) (relying on the Court's holding in Pap's A.M., a case involving a public nudity ordinance, to explicate the evidentiary showing necessary to sustain an adult entertainment zoning ordinance); *Barnes, 501 U.S. at 583-84* (Souter, J., concurring) (relying on the evidentiary standard described in Renton, a zoning case, to explicate the evidentiary showing necessary to sustain a public nudity ordinance). After identifying the applicable standards, we apply them to each of the ordinances at issue in this case." *Id.* at 1259.

The bottom line is that the lack of clarity in this area of the law has created irreconcilable conflicts and inconsistencies that fully justify the granting of this Petition.

CONCLUSION

The state of confusion and failure to articulate established United States Supreme Court precedent in guiding its determination justifies review of the Rule 23 Order by this Court. Such review is necessary to ensure appropriate clarification of the Appellate Court's confusion with the most recent United States Supreme Court precedent, and also to eliminate the clear conflicts that exist at virtually every level of the judiciary in this area of the law. It is respectfully requested that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — RULE 23 ORDER OF THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT DATED JULY 8, 2005

IN THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT

No. 2-04-0255

XLP CORPORATION, d/b/a Dancers, a sole proprietorship, an Illinois corporation, MICHAEL J. CHRISTOFALOS and DANNY CHRISTOFALOS, d/b/a BABY DOLLS, and GEORGE STANTOPOLOUS, d/b/a "VIDEO MAGIC."

Plaintiffs-Appellants,

v.

COUNTY OF LAKE, a body politic and corporate,

Defendant-Appellee.

RULE 23 ORDER

Plaintiffs, XLP Corporation, Michael J. Christofalos, Danny Christofalos, and George Stantopolous, filed an action in the circuit court of Lake County alleging that an ordinance enacted by Lake County (the county or defendant) that regulated adult establishments was unconstitutional. Following a bench trial, the circuit court entered judgment in defendant's favor. Plaintiffs now appeal, and, for the reasons that follow, we affirm.

Appendix A

I. BACKGROUND

In 1998, Lake County enacted an ordinance regulating adult uses. See Lake County Ordinance 6:1-15 (eff. February 10, 1998). In response to a court decision that called into question the constitutionality of the ordinance (see *Wisconsin Vendors, Inc. v. Lake County, No. 99-C-8340, 2003 WL 366580 (N.D.Ill.2003)*), it was amended in 2001 (see Lake County Ordinance 6:1-15 (eff. October 9, 2001)). The purposes of the ordinance and its amendment were set forth by the county in preambles to the two enactments. The preamble to the original ordinance contains an extensive statement listing problems that the county board found were caused by adult uses, including crime, the deterioration of residential neighborhoods, the instability of nearby commercial and business uses, a "dehumanizing and distracting influence" upon young people, and the spread of diseases.

As amended, the ordinance set forth a number of conditions pertaining to adult businesses. Among its provisions are the following: (1) adult uses must obtain a license; (2) establishments may operate only from noon to midnight; (3) establishments must close on Sundays and state holidays; (4) employees are forbidden from appearing nude; (5) straddle dances are prohibited; and (6) exterior signs are limited to 32 square feet. Adult cabarets are subject to additional restrictions, including: (1) performances are limited to a stage raised at least 18 inches above the patron seating area and separated from it by 8 feet; (2) the establishment must be lit such that all items within it are plainly visible; (3) dancers are forbidden from receiving tips

directly from customers; (4) tips must be placed in a receptacle after the completion of the performance; and (5) no person under the age of 21 is allowed on the premises.

In response, plaintiffs initiated the instant action, alleging violations of their rights under the first and fourteenth amendments to the United States Constitution. *U.S. Const., amends. I, XIV.* The cause proceeded to a bench trial, following which the circuit court entered judgment in defendant's favor. Due to the fact that a number of the issues are relatively discrete and that much evidence is relevant only to certain portions of this opinion, we will not set forth the evidence adduced at trial here. Instead, we will discuss it as we analyze the issues plaintiffs press in this appeal.

II. ANALYSIS

Plaintiffs raise the following issues. First, they argue that the licensing scheme contained within the ordinance constitutes an unlawful prior restraint. Second, they contend that Lake County has failed to demonstrate that the ordinance is justified by the purported need to control adverse secondary effects. In this argument, plaintiffs attack the ordinance as a whole. While they do at times mention certain restrictions contained in the ordinance, they do not focus on subparts of the ordinance. Accordingly, we will analyze plaintiffs' argument as a challenge to the constitutionality of the entire ordinance. Third, they assert that the age restrictions contained in the ordinance are invalid.

Appendix A

A. PRIOR RESTRAINT

Plaintiffs first allege that the licensing provision in the ordinance is an unconstitutional prior restraint. They argue that the scheme "permits unbridled discretion in determining whether to allow permitted expression to occur." According to plaintiffs, this discretion is found in section 7(E) of the ordinance, which states that the applicant's failure "to give any information reasonably relevant to the investigation of the application * * * shall constitute an admission by the applicant that the applicant is ineligible for an Adult Establishment License" (Lake County Ordinance 6:1-15 (eff. October 9, 2001)). Plaintiffs contend that this provision results in unbridled discretion because "there is no limitation whatsoever on the 'information reasonably relevant to the application.' "

Prior restraints on speech are strongly disfavored. *People v. Sequoia Books, Inc., 127 Ill.2d 271, 281, 130 Ill.Dec. 235, 537 N.E.2d 302 (1989).* Nevertheless, a properly limited licensing regulation is not unconstitutional. A licensing regulation that places unbridled discretion in the hands of the decision maker to permit or deny speech violates the first amendment. *City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757, 108 S.Ct. 2138, 2144, 100 L.Ed.2d 771, 782 (1988).* To pass constitutional muster, a licensing scheme must contain specific guidelines regarding how the decision to grant or deny a license is to be made. *International Union of Operating Engineers, Local 150 v. Village of Orland Park, 139 F.Supp.2d 950, 960 (N.D.Ill.2001).* On this issue, the burden of proof lies with the government *(International Union of Operating Engineers, Local 150, 139 F.Supp.2d at*

960), and our review of constitutional issues is *de novo (Weinberg v. City of Chicago, 310 F.3d 1029, 1035 (7th Cir.2002))*.

We do not read the provision of section 7(E) about which plaintiffs complain as placing unbridled discretion with those responsible for making the licensing decision. Certainly, if the only guidance given by the ordinance were that an applicant must provide "any information reasonably relevant to the investigation of the application," there would be little to limit the discretion of the decision maker. However, section 8(A) of the ordinance, titled "Standards for Issuance or Denial of License," provides ample detail as to what is relevant to the processing of the application. Section 8(A) limits the inquiry to whether persons listed in the application are of a specified minimum age; whether the applicant or the applicant's spouse or a person with whom the applicant is cohabiting has had a similar license revoked within the past 12 months; whether the establishment conforms with applicable building, zoning, health, and safety codes; and whether the applicant has confirmed in writing that he or she has read the ordinance and will comply with it. Some additional information must be disclosed pursuant to section 6, which pertains to the nature of the business and the background of the applicant. However, outside of the requirement that this information be supplied, the information required by section 6 does not form the basis of whether a license may be issued under section 8(A).

Thus, any apparent discretion vested by section 7(E) is limited to the specific criteria set forth in other sections of the ordinance. Information is reasonably relevant to the

application only if it relates in some substantial way to the requirements for issuing the license. Relevance is not so esoteric and amorphous a concept that it would allow the decision maker to demand virtually anything from an applicant. Moreover, section 7(G) of the ordinance makes such decisions subject to judicial review. See Lake County Ordinance 6:1-15 (eff. October 9, 2001). We note that other courts have upheld provisions substantially similar to the one at issue here. See *Brownell v. City of Rochester, 190 F.Supp.2d 472, 494 (W.D.N.Y.2001)*; *Centaur, Inc. v. Richland County, 301 S.C. 374, 380, 392 S.E.2d 165, 170 (1990).*

Accordingly, we hold that Lake County's adult-use ordinance does not vest the decision maker with "unbridled discretion" to grant or deny a permit to operate an adult establishment. We therefore reject plaintiffs' argument on this point.

B. SECONDARY EFFECTS

Plaintiffs next argue that the ordinance is not a legitimate attempt to control the secondary effects of adult establishments. This argument presents an issue that has often been litigated in the courts of this nation: when and to what extent may the government regulate an adult use? Resolution of this issue is complicated by courts' inability to articulate a clear set of principles to govern cases such as these. The decision in *City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002)*, for example, did not command a majority of the Supreme Court. The plurality opinion was joined by Justice Kennedy; however, he rejected the previously relatively well-

established notion that legislation targeting secondary effects is content-neutral. *Alameda Books, Inc., 535 U.S. at 448, 122 S.Ct. at 1741, 152 L.Ed.2d at 689* (Kennedy, J., concurring). Likewise, in *Pap's A.M. v. City of Erie, 553 Pa. 348, 358, 719 A.2d 273, 278-79 (1998), overruled, City of Erie v. Pap's A.M., 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000)*, the Pennsylvania Supreme Court eschewed reliance upon *Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991)*, despite the similarity between *Barnes* and the case before it. That court observed that, "aside from the agreement by a majority of the *Barnes* Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the *Barnes* Court agreed." *Pap's A.M., 553 Pa. at 358, 719 A.2d at 278.* Similarly, *Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976)*, resulted in a badly fractured court. In short, guidance from the Supreme Court on this issue has been somewhat less than clear. Therefore, we must begin our analysis by setting forth the law as best we can derive it from applicable precedent.

Not surprisingly, given the somewhat nebulous state of the case law, both parties' briefs are a bit confused on this issue. Central to their disagreement, however, is what evidence is required to support an enactment such as the ordinance at issue here. Similarly, the parties disagree as to how much deference we owe a legislative body that enacts such an ordinance. Plaintiffs assert that we owe no deference to the Lake County Board. Defendant, on the other hand, at times suggests that so long as the evidence supporting the enactment was of a sort that could be reasonably relied on by the county board, the ordinance is not problematic. Neither

of these two extremes represents the law, although both represent portions of the analysis that we must undertake. We conduct *de novo* review of constitutional questions *(Weinberg, 310 F.3d at 1035);* however, with regard to questions of fact, we defer to the trial court so long as its findings are not contrary to the manifest weight of the evidence. See *Ward v. Rock Against Racism, 491 U.S. 781, 802, 109 S.Ct. 2746, 2759, 105 L.Ed.2d 661, 682 (1989)* ("In view of these findings, which were not disturbed by the Court of Appeals, we must conclude that the city's guideline has no material impact on any performer's ability to exercise complete artistic control over sound quality").

The entire analysis involves three steps. First, we must determine whether the ordinance is a total ban on speech or simply a time, place, or manner restriction. *City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46, 106 S.Ct. 925, 928, 89 L.Ed.2d 29, 37 (1986).* Second, we must decide whether the ordinance is content-based or content-neutral. *City of Renton, 475 U.S. at 47-49, 106 S.Ct. at 928-30, 89 L.Ed.2d at 37-39.* If the ordinance is found to be content-based, it is subject to strict scrutiny; if content-neutral, we proceed to the next step. *Alameda Books, Inc., 535 U.S. at 434, 122 S.Ct. at 1733, 152 L.Ed.2d at 680.* The third prong requires that we ask whether the ordinance is designed to serve a substantial government interest while leaving open reasonable alternative avenues of communication. *City of Renton, 475 U.S. at 50, 106 S.Ct. at 930, 89 L.Ed.2d at 39.*

In this case, the first step does not require significant analysis. The ordinance does not ban all adult speech. Instead, it limits the hours adult businesses may be open, requires

licenses, sets a minimum age for employees and patrons, puts conditions upon how such speech may be communicated, and imposes other similar requirements. As it does not ban adult establishments altogether, it is properly analyzed as a time, place, or manner restriction. See *City of Renton, 475 U.S. at 46, 106 S.Ct. at 928, 89 L.Ed.2d at 37.* The parties do not seriously contest this prong.

The second prong concerns whether the ordinance is content- based or content-neutral. *City of Renton, 475 U.S. at 47-49, 106 S.Ct. at 928-30, 89 L.Ed.2d at 37-39.* One might suppose that whether an ordinance is content-based would be determined by looking at the face of the ordinance and seeing what it purports to regulate; however, this is not the case. Though it may seem peculiar, whether an ordinance is content-based is a matter of legislative intent. See *Alameda Books, Inc., 535 U.S. at 440-41, 122 S.Ct. at 1737, 152 L.Ed.2d at 684*, quoting *City of Renton, 475 U.S. at 47, 106 S.Ct. at 929, 89 L.Ed.2d at 37-38* (emphasis omitted) (whether an ordinance is content-neutral "requires courts to verify that the 'predominate concerns' motivating the ordinance 'were with the secondary effects of adult [speech], and not with the content of adult [speech]' "). As the Seventh Circuit Court of Appeals observed, "Whatever the label, *Renton's* second step is best conceived as an inquiry into the purpose behind an ordinance rather than an evaluation of the ordinance's form." *R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402, 407 (7th Cir.2004).*

At this stage, the inquiry is highly deferential to the legislative body that enacted the ordinance. Because this inquiry concerns only the motivation of the enacting body, it

is sufficient that a defendant set forth a basis upon which it reasonably could have relied to justify the ordinance without reference to the speech. *Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1058-59 (9th Cir.1986).* This is undeniably a difficult standard for a plaintiff to overcome. *Colacurcio v. City of Kent, 163 F.3d 545, 551-52 (9th Cir.1998).* That a plaintiff face a high burden here is appropriate, as inquiries into legislative intent are often problematic. Notably, in *Pap's A.M., 529 U.S. at 296, 120 S.Ct. at 1394, 146 L.Ed.2d at 282,* the Supreme Court stated:

> "Even if the city thought that nude dancing at clubs like Kandyland constituted a particularly problematic instance of public nudity, the regulation is still properly evaluated as a content-neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing."

Thus, absent extraordinary circumstances, it is clear that an ordinance that seeks to regulate adult speech will be deemed content-neutral.

We recognize that the Supreme Court recently split regarding the nature of this inquiry. While the plurality in *Alameda Books, Inc., 535 U.S. at 434, 122 S.Ct. at 1733, 152 L.Ed.2d at 680,* adhered to the test as set forth in *City of Renton,* Justice Kennedy concurred and set forth a somewhat different analysis. He rejected the distinction between content-based and content-neutral regulations. *Alameda Books, Inc., 535 U.S. at 448, 122 S.Ct. at 1741, 152 L.Ed.2d*

at 689 (Kennedy, J., concurring). Nevertheless, he wrote, if a city can decrease adverse secondary effects while leaving the quantity and accessibility of the speech substantially the same, it may take such steps, "even if the measure identifies the problem outside [of an establishment] by reference to the speech inside—that is, even if the measure is in that sense content based." *Alameda Books, Inc., 535 U.S. at 445, 122 S.Ct. at 1739, 152 L.Ed.2d at 687* (Kennedy, J., concurring). To withstand constitutional scrutiny, "[t]he *purpose* and effect of a[n] * * * ordinance must be to reduce secondary effects and not to reduce speech." (Emphasis added.) *Alameda Books, Inc., 535 U.S. at 445, 122 S.Ct. at 1740, 152 L.Ed.2d at 687* (Kennedy, J., concurring). Thus, though his analysis differed from the plurality's, the purpose of a regulation remains an issue. Moreover, as under the traditional test followed by the plurality, Justice Kennedy concluded that intermediate scrutiny was appropriate. *Alameda Books, Inc., 535 U.S. at 447, 122 S.Ct. at 1741, 152 L.Ed.2d at 689* (Kennedy, J., concurring).

Thus, under the reasoning of both Justice Kennedy and the plurality, the purpose of the ordinance must be assessed. Although the contours of the inquiry into purpose are not clear under Justice Kennedy's analysis (see *Alameda Books, Inc., 535 U.S. at 447, 122 S.Ct. at 1741, 152 L.Ed.2d at 689* (Kennedy, J., concurring) ("The ordinance may be a covert attack on speech, but we should not presume it to be so. In the language of our First Amendment doctrine it calls for intermediate and not strict scrutiny, as we held in *Renton* ")), they are clear under the traditional analysis (see *Ward, 491 U.S. at 791, 109 S.Ct. at 2754, 105 L.Ed.2d at 675*). So long as the regulation can be justified without reference to

the content of the speech, it is content-neutral. *Ward, 491 U.S. at 791, 109 S.Ct. at 2754, 105 L.Ed.2d at 675.* In other words, if there was some basis upon which the legislative body reasonably could have relied, for the purpose of the *Renton* analysis, the regulation is content-neutral. *Kev, Inc., 793 F.2d at 1058- 59.*

With these standards in mind, we will now address the issue of the purpose of the ordinance and whether it is content-based or content-neutral. At this stage of the inquiry, it must be remembered, all that is required is a basis upon which the board reasonably could have relied in enacting the ordinance. *Kev, Inc., 793 F.2d at 1058-59.* Plaintiffs contend that there was "absolutely no evidence" that could have supported enacting either the original or the amended ordinance. This proposition is simply untrue. As plaintiffs acknowledge, board members "were given a summary of some * * * studies by their counsel." Further, plaintiffs admit that there were studies to which the board referred. They complain, however, that there is no evidence that those materials were actually considered or even read by individual board members. Plaintiffs do not cite any authority to support their contention that board members must read a study rather than hear a summary of it. In the course of making this portion of the argument, they cite only *Pleasureland Museum, Inc. v. Beutter, 288 F.3d 988 (7th Cir.2002),* which is inapposite, as the portion of the case that plaintiffs *appear to* rely upon was decided under the third prong of the *Renton* analysis. See *Pleasureland Museum, Inc. v. Beutter, 288 F.3d at 1002.* We say "appear to" because plaintiffs have not provided pinpoint citations to the material upon which they rely in this source, which waives any reliance they would place upon

it. See *Chicago Title & Trust Co. v. Weiss, 238 Ill.App.3d 921, 927-28, 179 Ill.Dec. 78, 605 N.E.2d 1092 (1992)* (noting that violation of *Supreme Court Rule 341(d)*, which incorporates *Supreme Court Rule 6*, can result in waiver of an argument). We also note that, when the board amended the ordinance, it heard testimony from representatives of Lake County's law enforcement community regarding undercover operations that resulted in arrests for prostitution.

In sum, as noted above, under this prong of the test, plaintiffs bear a high burden. See *Colacurcio, 163 F.3d at 551-52*. Once the county set forth a basis upon which it reasonably could have relied in enacting the ordinance, it became incumbent upon plaintiffs to show that the actual purpose behind the ordinance was to suppress speech. Simply criticizing the information that the county relied on is not sufficient, so long as that evidence provided a reasonable basis for the county's action. We will therefore review the ordinance as content-neutral. We now turn to the third prong of the test, which is not as deferential to the government.

The third prong asks whether the ordinance is designed to serve a substantial government interest while leaving open reasonable alternative avenues of communication. *City of Renton, 475 U.S. at 50, 106 S.Ct. at 930, 89 L.Ed.2d at 39.* This prong requires that the government demonstrate a connection between the speech that is regulated and the secondary effects it purportedly causes. *Alameda Books, Inc., 535 U.S. at 441, 122 S.Ct. at 1737, 152 L.Ed.2d at 684.* It is at this stage that a court first must evaluate and weigh the evidence regarding a link between the speech and its secondary effects. *Alameda Books, Inc., 535 U.S. at 441, 122*

S.Ct. at 1737, 152 L.Ed.2d at 684. That the ordinance must be designed to serve a substantial government interest does not mean that the government must employ the least restrictive means available to address the problem. *Mitchell v. Comm'n on Adult Entertainment Establishments, 10 F.3d 123, 137 (3rd Cir.1993).*

The evidentiary burden shifts between the parties. Initially, a municipality need only set forth evidence it " 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Alameda Books, Inc., 535 U.S. at 438, 122 S.Ct. at 1736, 152 L.Ed.2d at 683,* quoting *City of Renton, 475 U.S. at 51, 106 S.Ct. at 931, 89 L.Ed.2d at 40.* Then, the party challenging the ordinance is allowed an opportunity to "cast direct doubt on this rationale." *Alameda Books, Inc., 535 U.S. at 438, 122 S.Ct. at 1736, 152 L.Ed.2d at 683.* It may do so either by showing that the government's evidence does not support its rationale or by setting forth countervailing evidence of its own. *Alameda Books, Inc., 535 U.S. at 438-39, 122 S.Ct. at 1736, 152 L.Ed.2d at 683.* If the challenger does not meet this burden, the inquiry ends and the government has met its burden. *Alameda Books, Inc., 535 U.S. at 438-39, 122 S.Ct. at 1736, 152 L.Ed.2d at 683.* If, however, the challenger succeeds in casting doubt on the government's purported rationale, the burden returns to the government to set forth additional evidence supporting its theory. *Alameda Books, Inc., 535 U.S. at 439, 122 S.Ct. at 1736, 152 L.Ed.2d at 683.* Note that at this stage, unlike the second, the evidence need not have been considered by the body that enacted the ordinance, because we are no longer concerned with legislative intent, but with the actual

connection between the speech and its purported secondary effects.

A trial, of course, does not proceed in this manner; the burden of proof, and the ability to present evidence, does not shift back and forth. Thus, the framework set forth in the preceding paragraph is probably more useful, and more adhered to, during pretrial dispositive motions. In a trial, each party sets forth all of its evidence at once, with an opportunity for rebuttal. Hence, in this case, evaluating the evidence in stages according to shifting burdens would be artificial. Suffice it to say that both parties presented ample evidence to meet their burdens under the first two parts of the third prong. There was ample evidence to support the county's rationale for the ordinance, and plaintiffs presented ample evidence to cast doubt on that rationale. We will therefore evaluate the evidence in total under the third portion of the inquiry. Given that it entails a full evaluation of all of the evidence, whichever party prevails at this stage also would have satisfied the earlier portions of this prong.

At trial, plaintiffs set forth the following evidence. They first called Dr. Judith Hanna, who holds a Ph.D. in anthropology and whose area of expertise is nonverbal communication and the role of dance in society. The trial court found that she could testify as an expert on "dance as related to anthropology." Hanna testified that dance communicates a message and that exotic dance "meets the criteria of dance." Use of space is a critical element of all dance, and often touch is an element as well. She characterized nudity as the "punch line" of exotic dance and stated that nudity expresses a message. Hanna described the

history and origins of exotic dance. Further, requiring that the stage be at least 18 inches off the ground and be separated by a three-foot high partition would affect the message conveyed by the dance by suggesting coldness, dislike, and distrust. Provisions prohibiting tipping dancers directly would impede the feedback the dancers receive. Hanna opined that adult establishments cause no adverse secondary effects.

Plaintiffs also presented the testimony of Bruce McLaughlin, a consultant to local governments on land use and planning issues. He reviewed a number of studies that have been used by local governments to support the position that adult businesses cause adverse secondary effects. In his opinion, the studies do not support this proposition. McLaughlin testified that adult businesses cause neither decreases in property values nor increases in crime. He criticized a report generated by the Lake County chief of police regarding the number of crimes occurring at adult businesses, because it made no comparison to crimes occurring at nonadult establishments. He also noted that the report included occasions where the police visited an establishment on their own initiative just to see what was happening at the establishment. Furthermore, the report did not establish that the reported crimes were actually connected to the adult businesses as opposed to something else nearby.

Michael Christofalos, who owns XLP Corporation, which operates "Dancers," testified that the club is open from 7 p.m. to 3 a.m. on weekdays. On weekends, it operates from 7 p.m. to 4 a.m. The club does not serve alcohol. The majority of the club's business occurs between 11 p.m. and closing.

Appendix A

Requiring the club to close at midnight would deprive it of 75% of its business. The ordinance's requirements regarding the construction of the stage would limit the ability of patrons to see the dancers, and the requirement that dancers remain at least eight feet from the patrons would eliminate 75% of the club's seating. He believed that he would not be able to stay in business in conformance with the ordinance. He acknowledged that on one occasion, four dancers were arrested and convicted of prostitution.

Danny Christofalos, who operates "Baby Dolls," also testified. He has owned Baby Dolls since 1996. The club is open from 4 p.m. to 3 a.m. on weekdays. It closes at 4 a.m. on Saturdays and 1 a.m. on Sundays. The majority of the club's business occurs after midnight, representing over 70% of its income. The specifications regarding stage construction would impair patrons' ability to observe dancers perform. Further, requiring dancers to stay eight feet away from patrons would eliminate much of the club's seating. He testified that one of his employees had been convicted of prostitution, and one of solicitation, in January 2000.

Diana Lancaster, who has been employed as a dancer at Dancers for over five years, next testified. She testified that when she dances on stage, it is an act during which she does attempt to communicate a message. Disrobing is a component of her performance. Being able to make eye contact with a patron is an important part of the performance, and eye contact is a means of communication. Lancaster did state that she would be able to communicate the same message from a distance of eight feet.

Appendix A

The first witness called by the county was Theodore Johnson, a land-use consultant and planner. Johnson testified that the intersections at which Baby Dolls and Dancers were located were attractive commercial properties; however, they had not been developed as would typically be expected. He opined that the adult uses retarded development of these intersections. Johnson also testified that he spoke to some land developers who stated that they were apprehensive about developing land near adult uses. Johnson has worked with Costco for 12 years. That company requires a provision in its leases that prohibits landlords from leasing or selling nearby properties to adult establishments.

Next, the county called Kathy Kelly. Since 1998, she has been the general manager of Forty-One News, an adult bookstore located adjacent to Baby Dolls. Forty-One News contains a number of video booths. A majority of the booths contain holes between them. The booths used to contain waste baskets, but they had to be removed because customers were setting them on fire. Although she stated that the rule that only one patron is allowed in a booth is no longer frequently violated, she acknowledged that she has to enforce the rule on a daily basis. She also has to ask people to leave every day; however, she has not had to ask anyone to leave for solicitation of prostitution in about two years. Kelly testified that the owner of Forty-One News also owns a motel located next door. Kelly manages the motel. Jason Strong, an employee of Forty-One News, lived at the motel until he was arrested for murder.

Dr. Eric Kelly, who holds a law degree and a Ph.D. in public policy, next testified for the county. He stated that he

has performed studies and surveys regarding adult uses for various local government entities. Dr. Kelly visited both Dancers and Baby Dolls. At Baby Dolls, he observed a dancer wrap her breasts around a customer's face.

Dr. Kelly testified that he has observed other adult establishments. He believed that the best way to prevent unlawful physical contact between dancers and patrons is to keep the two apart. He stated that short distance restrictions, such as an 18-inch restriction in place in Toledo, are too difficult to enforce. He opined that anything shorter than an eight-foot restriction would allow at least some limited physical contact between patrons and dancers. Dr. Kelly also opined that the restriction on tipping contained in the ordinance served to limit illegal activity. Parenthetically, we note that several questions were posed to Dr. Kelly regarding whether certain portions of the regulations were "reasonably related" to preventing illegal activity. We do not read his answers as the expression of a legal point; we take them simply as statements regarding causation. Dr. Kelly stated that the studies upon which the county relied did support the ordinance. He stated that the summary of the studies provided to the board was accurate.

Richard Eckenstahler, the chief of operations for the Lake County sheriff's department, testified as an expert on law enforcement. He served as a highway patrolman from 1979 to 1986. During this period, he was called to respond to complaints at adult uses approximately once a week or once every two weeks. Most often, the complaints involved customer disputes or batteries. In 1985, he participated in an undercover operation targeting prostitution at the Roman

House, an establishment that is no longer in business, having been declared a public nuisance. He chronicled other incidents, including the placement of dynamite on the roof of an adult establishment in the early 1980s; the beating of a patron by an employee of the club that became Dancers; two incidents of arson; and three undercover operations targeting prostitution at or near Baby Dolls or Dancers. Additionally, an employee of Forty-One News was convicted of a murder that occurred in the adjacent motel.

Eckenstahler testified that from 1979 to 2001, 202 police reports were generated from incidents occurring at adult establishments in Lake County. During the same period, there were 405 additional incidents at adult establishments that did not generate formal police reports. He opined that the numbers of assaults, batteries, and sex-related crimes were "high and noteworthy." Eckenstahler conducted a comparative study of adult uses and other establishments. He tried to select busy bars and taverns that were located near the adult establishments and were of similar size and capacity. He testified that the number of incidents at bars and taverns was less than at Baby Dolls and Dancers, despite the fact that the bars and taverns served alcohol while the two adult establishments did not. Eckenstahler also opined that crimes at adult establishments are under-reported because victims do not want it known that they were at adult establishments. He also believed that the licensing and regulation of adult establishments would be an effective tool for law enforcement in minimizing the criminal activity.

Andrea Usry, a Lake County sheriff's deputy, took part in an undercover operation in which she rented a room at the

motel located next to Forty-One News. The operation resulted in three arrests and one conviction for solicitation. During this operation, she garnered information that led to the conviction of Jason Strong for murder. She did acknowledge that she was asked to leave the area because she was believed to be a prostitute. Usry also testified that the area around Baby Dolls was a problem area. On one occasion, she was dispatched to the area and discovered two men engaged in sexual activity in a car. On another occasion, she was called to Baby Dolls because one dancer had pulled a pair of scissors on another. Also, she responded to an incident where a man was kicking a pregnant woman outside of Baby Dolls. She acknowledged that she had no reason to believe that either person was affiliated with Baby Dolls or Forty-One News. On still another occasion, she discovered a child unattended in a truck while his father was inside Forty-One News at 2 a.m.

Officer Cory Kelly testified that, on November 20, 2001, she was involved in an undercover reverse-sting operation. She posed as a prostitute in the parking lot of Baby Dolls. The operation lasted six hours and resulted in seven arrests and six convictions for solicitation of a sex act.

The evidence was obviously conflicting, and each party made a considerable effort to diminish the credibility of the other's witnesses. In a well-reasoned discussion of the third stage, the trial court found that the evidence fairly justified the enactment of the ordinance. For the purpose of resolving this question, the trial court assumed that plaintiffs had succeeded in casting doubt on the county's evidence. The trial court first noted the evidence of actual prostitution and

solicitation convictions. It then noted that the opinions of Dr. Hanna and McLaughlin were undermined by the fact that they were unaware that there had been convictions for prostitution at both Baby Dolls and Dancers. McLaughlin expressly stated that the existence of prostitution convictions within the preceding five years would affect his opinion regarding whether the adult establishments caused adverse secondary effects. The trial court credited the testimony of Officer Kelly and Eckenstahler regarding a higher incidence of crime occurring at the establishments. It noted Officer Usry's recounting of specific incidents that took place in or near Baby Dolls. The trial court found Lancaster credible and specifically noted her testimony that she could communicate her message from a distance of eight feet.

We completely endorse the trial court's reasoning, both as to its factual findings and its assessments of the credibility of witnesses, to which we owe deference *(Ward, 491 U.S. at 802, 109 S.Ct. at 2759, 105 L.Ed.2d at 682)*, and its legal conclusions, which we review *de novo (Weinberg, 310 F.3d at 1035)*. Plaintiffs contend that the trial court applied the wrong standard, citing portions of the trial court's opinion where it stated that it found that the evidence "supports a theory justifying the ordinance." We do not read this as a simple application of the rational basis test; rather, it seems to us that the trial court was finding that the evidence in fact supported a connection between the harm sought to be controlled and the means chosen to do so (see *Alameda Books, Inc., 535 U.S. at 441, 122 S.Ct. at 1737, 152 L.Ed.2d at 684-85)*. More importantly, we ourselves conclude that the evidence shows that the ordinance serves a substantial government interest. *City of Renton, 475 U.S. at 50, 106 S.Ct. at 930, 89 L.Ed.2d at 39.*

Plaintiffs argue that "mere anecdotal recitation of various specific events" occurring at the adult establishments, without a meaningful comparison to other businesses, does not suffice. First, we note that Eckenstahler did make comparisons to nonadult businesses, including bars and taverns. Second, although we would agree with plaintiffs if the only evidence available were anecdotal, a legitimate inference that the adult uses cause adverse secondary effects can be drawn from the combination of studies conducted by other units of local government and evidence of particular incidents occurring at local establishments. The county was entitled to use studies conducted in other localities. *Pap's A.M., 529 U.S. at 297, 120 S.Ct. at 1395, 146 L.Ed.2d at 283.* These studies support an inference that adult uses cause adverse secondary effects generally. That there actually were crimes occurring around the adult uses in question in this case indicates that the studies are applicable here.

Plaintiffs contend that Johnson's testimony was completely irrelevant, as he is an expert on land-use planning and his opinions concerned matters of zoning. Plaintiffs point out that the ordinance has nothing to do with zoning. The obvious relevance of Johnson's testimony concerns whether a problem exists, rather than solutions for the problem. Zoning laws are sometimes used to address adverse secondary effects. See, *e.g., Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).* However, a unit of local government might choose another way to address problems it faces, such as the ordinance Lake County has enacted. See *Pap's A.M., 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265.* That the county chose a manner other than zoning to address the problems it perceived does not mean

that Johnson's testimony regarding the existence of a problem is irrelevant.

Plaintiffs also assert that both Dr. Kelly and Eckenstahler "admitted" that the county had no evidence before it when it enacted the ordinance. Even if this were true, it is not relevant at this stage of the inquiry. Plaintiffs criticize Eckenstahler's testimony as representing a " subjective view" that there was a high incidence of criminal activity around the adult businesses. Eckenstahler, however, testified as an expert on the matter of law enforcement. As such, he was entitled to opine on relevant matters. Opinions, by their very nature, are subjective. See Black's Law Dictionary 579 (7th ed.1999) (defining "opinion evidence" as "[a] witness's belief, thought, or inference about a disputed fact"). Hence, that Eckenstahler's testimony could be characterized as subjective is neither surprising nor problematic. For the same reason, plaintiffs' reliance on *R.V.S., L.L.C., 361 F.3d at 407*, is inapposite.

Plaintiffs rely on *XLP Corp. v. County of Lake, 317 Ill.App.3d 881, 887, 252 Ill.Dec. 588, 743 N.E.2d 162 (2000)*, the earlier occasion when this case came before this court following the trial court's erroneous grant of judgment on the pleadings. In that case, we rejected the county's argument that judgment was proper due to the recitals in the ordinance that indicated that it had relied on outside studies when it enacted the ordinance. The key difference between that appeal and the present one is that plaintiffs have now had an opportunity to contest the county's assertions at trial. At this point, we find that the weight of the evidence in the record shows a nexus between the ordinance and the harm it seeks to alleviate.

Likewise, *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, 337 F.3d 1251, 1272 (11th Cir.2003)*, upon which plaintiffs rely, was an appeal following a grant of summary judgment. In it, the court stated the following:

> "[W]e have before us an ordinance adopted only on the basis of speculative findings and outdated, foreign studies whose relevance to local conditions appears questionable in light of current data Appellants have placed in the record suggesting that plaintiffs' businesses, which have operated continuously in Manatee County for over fifteen years, do not cause secondary effects." *Peek-A-Boo Lounge of Bradenton, Inc., 337 F.3d at 1272.*

These factors, the court held, created a question of fact and entitled the plaintiffs to proceed past summary judgment. Here, plaintiffs have already proceeded beyond that point. After having their day in court, the factual question similar to the one at issue in *Peek-A-Boo Lounge* was resolved against them.

In sum, the evidence in the record adequately demonstrates a substantial connection between the ordinance and the secondary effects it is targeted at controlling. Plaintiffs' experts were undermined by their own acknowledgments regarding their lack of knowledge of prostitution convictions originating from incidents at and near the two establishments. On the other hand, we find plaintiffs' attempts to undermine the testimony of the county's experts unpersuasive. We therefore hold that the county has met its burden under *City of Renton.*

Before closing this section, we note that, though plaintiffs do mention the requirement that a regulation leave open adequate alternative avenues of communication, they make no sustained argument on this point. Accordingly, we will not consider it. See *Northern Trust Co. v. County of Lake, 353 Ill.App.3d 268, 273, 288 Ill.Dec. 701, 818 N.E.2d 389 (2004).*

C. THE AGE RESTRICTION

Plaintiffs' final contention is that the ordinance's age restrictions are unconstitutional. The ordinance prohibits anyone under the age of 21 to be on the premises, as either an employee or a patron. This argument consists of but a single paragraph, wherein plaintiffs simply state that there is no evidence in the record to justify these restrictions. They cite *Turner Broadcasting System, Inc. v. Federal Communications Comm'n, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).* That case dealt with provisions of a federal statute that required cable television operators to devote a number of channels to local broadcasting. Its application to this case is not immediately apparent. Plaintiffs also cite *Essence, Inc. v. City of Federal Heights, 285 F.3d 1272 (10th Cir.2002),* which is on point; however, plaintiffs do not discuss the case. No citations to the record are provided.

We deem this argument waived. As we have previously stated:

> "A reviewing court is entitled to have issues clearly defined with pertinent authority cited and

> cohesive arguments presented (134 Ill.2d R. 341(e)(7)), and it is not a repository into which an appellant may foist the burden of argument and research *(Pecora v. Szabo (1982), 109 Ill.App.3d 824, 825-26 [65 Ill.Dec. 447, 441 N.E.2d 360]);* it is neither the function nor the obligation of this court to act as an advocate or search the record for error *(Mielke v. Condell Memorial Hospital (1984), 124 Ill.App.3d 42, 48-49 [79 Ill.Dec. 78, 463 N.E.2d 216]).*" *Obert v. Saville, 253 Ill.App.3d 677, 682, 191 Ill.Dec. 740, 624 N.E.2d 928 (1993).*

Plaintiffs' argument raises more questions than it answers. For example, on its face, this appears to be an equal-protection issue; however, age classifications are not subject to heightened scrutiny. See *Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314-17, 96 S.Ct. 2562, 2567-69, 49 L.Ed.2d 520, 525-27 (1976).* Plaintiffs do not address this seemingly crucial point.

Having found this argument waived, we will not address it further. We express no opinion on the validity of the age restrictions contained in the ordinance.

III. CONCLUSION

In light of the foregoing, the judgment of the circuit court of Lake County is affirmed.

Affirmed.

GROMETER, J., with HUTCHINSON and CALLUM, JJ., concurring.

APPENDIX B — ORDER OF THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS DATED AND FILED NOVEMBER 25, 2003

STATE OF ILLINOIS)
) ss
COUNTY OF LAKE)

**IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS**

Gen. No. 98 CH 1106

XLP CORP et al.

vs.

COUNTY OF LAKE

ORDER

This case coming on for trial, for the reasons stated in open court as transcribed by court reporter Paula Straits, 18 North County Street, Waukegan, Illinois, a directed finding is hereby entered for Defendant County of Lake on Count V of Plaintiffs' Third Amended Complaint and Judgment is entered on Counts I and II of Plaintiffs' Third Amended Complaint in favor of Defendant County of Lake.

Appendix B

Dated at Waukegan, Illinois this
25th day of November, 2003

ENTER:
s/ [illegible]
Judge

ORDER PREPARED BY: Daniel Jasica ASA
(Please Print Name and
Address)
18 N. County St.
Waukegan, IL 60085

APPENDIX C — ORDER OF THE SUPREME COURT OF ILLINOIS DENYING PETITION FOR LEAVE TO APPEAL DATED DECEMBER 1, 2005

SUPREME COURT OF ILLINOIS
Clerk of the Court
Supreme Court Building
Springfield, Illinois 62701
(217) 782-2035

December 1, 2005

Mr. Wayne B. Giampietro
Stitt, Klein, Daday, Aretos & Giampietro
121 South Wilke Road, Suite 500
Arlington Heights, IL 60005

No. 100984 - XLP Corporation, etc., et al., petitioners, v. County of Lake, etc., respondent. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 23, 2005.

APPENDIX D — ORDINANCE AMENDING THE LAKE COUNTY ADULT USE LICENSING ORDINANCE

ORDINANCE NO. 6:1-15

AN ORDINANCE AMENDING THE
LAKE COUNTY ADULT USE
LICENSING ORDINANCE

WHEREAS, on February 10, 1998, the Lake County Board adopted Ordinance No. 6:1-15, "An Ordinance Establishing Licensing Regulations For Adult Entertainment Establishments" (the "Licensing Ordinance"); and

WHEREAS, in the course of implementing the Licensing Ordinance, the Adult Use commissioner has developed standards for applying and administering various provisions of the Licensing Ordinance; and

WHEREAS, in addition, recent court cases have found unconstitutional certain provisions of adult entertainment establishment licensing ordinances, particularly with respect to the definitions of various types of establishments, licensing disclosure, issuance, and denial requirements; and

WHEREAS, in a memorandum opinion and order dated August 1, 2001, the court in *Wisconsin Vendors v. Lake County, Illinois*, No. 99 C 8340, made a preliminary finding that the definition of "adult entertainment establishment" may be impermissibly vague; and

WHEREAS, in light of the court order, the Chairman and embers of the Lake County Board have determined that

it is desirable to formalize as part of the Licensing Ordinance the administrative standards developed by and for the Adult Use Commissioner for implementing the Licensing Ordinance; and

WHEREAS, in response to these judicial decisions, the Chairman and Members of the Lake County Board have carefully considered proposed amendments to the Licensing Ordinance and have determined that the amendments to the Licensing Ordinance set forth in this Ordinance properly address the concerns raised in recent cases without adversely impacting the significant and important public health, safety, and welfare interests that the Licensing Ordinance was designed and enacted to protect; and

WHEREAS, the Chairman and Members of the Lake County Board have further determined (i) that the Licensing Ordinance, as amended by this Ordinance, continues to be essential to the health, safety, and general welfare of the County and its residents; and (ii) that the rationale for the Licensing Ordinance, as set forth in the recitals to the Licensing Ordinance, are equally applicable to the amendments adopted pursuant to this ordinance; and

WHEREAS, the County has the power and, authority to adopt and enforce the terms, conditions, and regulations established in the Licensing Ordinance, as amended herein, pursuant to (i) its general police powers to protect the public health, safety, morals, and general public welfare; (ii) the Illinois Counties Code; and (iii) all other applicable provisions of law;

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NOW, THEREFORE, BE IT ORDAINED BY THE COUNTY BOARD OF THE COUNTY OF LAKE, ILLINOIS, as follows:

Section 1. Recitals.

The foregoing recitals, as well as the recitals set forth In the Licensing Ordinance, are incorporated herein as the findings and determinations of the Chairman and Members of the Lake County Board.

Section 2. Amendment.

The Licensing Ordinance shall be, and it is hereby, amended in its entirety to hereafter be and read as follows:

"*Section 1. Recitals.*

The foregoing recitals are incorporated herein as the findings and determinations of the Chairman and Members of the Lake County Board.

Section 2. Short Title.

This Ordinance shall be known as, and may be referred to as, the Lake County Adult Use ordinance.

Section 3. Definitions.

For the purposes of this Ordinance, the following terms, phrases, and words shall have the meanings given herein.

Appendix D

A. *Adult Booth.* Any area of an Adult Entertainment Establishment set off from the remainder of such Establishment by one or more walls or other dividers or partitions and used to show, play, or otherwise demonstrate any Adult Materials or to view any live performance that is distinguished or characterized by an emphasis on the exposure, depiction, or description of Specified Anatomical Areas or the conduct or simulation of Specified Sexual Activities.

B. *Adult Entertainment Establishment.* Any of the following Commercial Establishments, as defined herein:

1. *Adult Cabaret.* Any Commercial Establishment that as a substantial or significant portion of its business regularly features any of the following:

   (a) Persons who appear Semi-Nude.

   (b) Live performances that are distinguished or characterized by an emphasis on the exposure, depiction, or description of Specified Anatomical Areas or the conduct or simulation of Specified Sexual Activities.

2. Adult Store. Any Commercial Establishment (a) that contains one or more Adult Booths; (b) that as a substantial or significant portion

of its business offers for sale, rental, or viewing any Adult Materials; or (c) that has a segment or section devoted to the sale or display of Adult Materials.

3. Adult Theater. Any Commercial Establishment that as a substantial or significant portion of its business regularly features for presentation films, motion pictures, video or audio cassettes, slides, computer displays, or other visual representations or recordings that are distinguished or characterized by an emphasis on the exposure, depiction, or description of Specified Anatomical Areas, or the conduct or simulation of Specified Sexual Activities.

4. Substantial or Significant Portion of its Business. For purposes of the definitions in the Paragraphs 1, 2, and 3 of this Subsection B, the phrase "substantial or significant portion of its business" shall be deemed to apply to any Commercial Establishment that satisfies one or more of the following criteria:

(1) *Gross Sales.* 30 percent or more of the retail dollar value of the Commercial Establishment's annual gross sales derives from the sale, rental, or viewing of Adult Materials.

(2) *Floor Area.* 30 percent or more of the floor area of the Commercial Establishment is devoted to the display, viewing, or presentation

of Adult Materials, not including storerooms, stock areas, bathrooms, basements, or any other portion of the Commercial Establishment not open to the public.

(3) *Merchandise Displayed.* 30 percent or more of the retail dollar value of all merchandise displayed at any one time's attributable to Adult Materials.

(4) *Inventory.* 30 percent or more of all inventory of the Commercial Establishment (whether measured by retail dollar value or number of items) consists at any one time of Adult Materials.

(5) *Stock In Trade.* 30 percent or more of the stock in trade at Commercial Establishment consists at any one time of Adult Materials.

(6) *Live Performances.* Live performances by persons appearing semi-Nude, or live performances that are otherwise distinguished or characterized by an emphasis on the exposure, depiction, or description of Specified Anatomical Areas or the conduct or simulation of Specified Sexual Activities; and that are taking place 30 percent or more of the time during which the Commercial Establishment is open for business.

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C. *Adult Establishment Employee.* Any individual, including entertainers, who work in or at, or render any services directly related to the operation of, an Adult Entertainment Establishment; provided, however, that this definition shall not include persons delivering goods, materials (other than Adult Materials), food and beverages, or performing maintenance or repairs, to the Licensed Premises.

D. *Adult Establishment License.* A license issued for an Adult Entertainment Establishment pursuant to the provisions of this Ordinance.

E. *Adult Establishment Patron.* Any individual, other than an Adult Establishment Employee, present in or at any Adult Entertainment Establishment at any time when such Adult Entertainment Establishment is open for business; provided, however, that this definition shall not include persons delivering goods, materials (other than Adult Materials}, food and beverages, or performing maintenance or repairs, to the Licensed Premises.

F. *Adult Material.* Any of the following, whether new or used:

1. (a) Books, magazines, periodicals, or other printed matter, or digitally-stored materials; or

(b) films, motion pictures, video or audio cassettes, slides, computer displays, or other visual representations or recordings of any kind; or

(c) live performances;

that are distinguished or characterized by an emphasis on the exposure, depiction, or description of Specified Anatomical Areas, or the conduct or simulation of Specified Sexual Activities.

2. Instruments, novelties, devices, of paraphernalia that are designed for use in connection with Specified Sexual Activities, or that depict or describe Specified Anatomical Areas.

G. *Adult Use Commission.* A commission appointed by the Adult Use Commissioner pursuant to Section 4 of this Ordinance.

H. *Adult Use Commissioner.* The Chairman of the County Board of the County of Lake, pursuant to Section 4 of this Ordinance.

I. *Commercial Establishment.* Any place where admission, services, performances, or products are provided for or upon payment of any form of consideration.

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J. *County Unified Development Ordinance.* The ordinance known and referred to as the Lake County Unified Development Ordinance, as it maybe amended from time-to-time.

K. *Days.* Calendar days, unless otherwise specifically set forth in this Ordinance.

L. *Licensed Premises.* The place or location described in an Adult Establishment License where an Adult Entertainment Establishment is authorized to operate. No sidewalks, streets, parking areas, public rights-of-way, or grounds adjacent to any such place or location shall be included within the Licensed Premises.

M. *Licensee.* Any person or entity that has been issued an Adult Establishment License pursuant to the provisions of this Ordinance.

N. *Nude or State of Nudity.* A state of dress or undress that exposes to view (i) less than completely and opaquely covered human genitals; pubic region; anus; or female breast below a point immediately above the top of the areola, but not including any portion of the cleavage of the female breast exhibited by a dress, blouse, shirt, leotard, bathing suit, or other wearing apparel, provided the areola is not exposed; or (2) human male genitals in a discernibly turgid state, even if completely and opaquely covered, or any device or covering that, when worn, simulates human male genitals in a discernibly turgid state.

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O. *Reviewing Departments.* Office of the Lake County Sheriff, the Lake County Health Department, and the Lake County Department of Planning and Development.

P. *Semi-Nude.* A state of dress or undress in which clothing covers no more than the genitals, pubic region, and areolas of the female breast, as well as portions of the body covered by supporting straps or devices or by other minor accessory apparel such as hats, gloves, and socks.

Q. *Specified Anatomical Areas.* Any of the following:

1. Less than completely and opaquely covered human genitals; pubic region; buttocks; anus; or female breast below a point immediately above the top of the areolas, but not including any portion of the cleavage of the female breast exhibited by a dress, blouse, shirt, leotard, bathing suit, or other wearing apparel, provided the areolas is not exposed.

2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered, or any device or covering that, when worn, simulates human male genitals in a discernibly turgid state.

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R. *Specified Criminal Act.* Any unlawful lewd, indecent, or immoral sexual conduct, including specifically, but without limitation, any of the lewd, indecent, or immoral sexual criminal acts specified in any of the following statutes:

1. Article II of the Illinois Criminal Code (sex offenses).

2. Section 26-4 of the Illinois Criminal Code, 720 ILCS 5/330 (unauthorized videotaping).

3. Section 33D-1 of the Illinois Criminal Code, 720 ILCS 5/330-1 (contributing to the criminal delinquency of a juvenile).

4. The Obscene Phone Call Act, 720 ILCS 135/0.01 *et seq.*

5. The Wrongs to Children Act, 720 ILCS 150/0.01 *et seq.*

6. The Improper Supervision of Children Act, 720 ILCS 640/0.01 *et seq.*

7. The Sale of Immoral Publications to Children Act, 720 ILCS 670/0.01 *et seq.*

S. *Specified Sexual Activities.* Any of the following:

1. Actual physical touching of human genitals, pubic region, buttocks, anus, or female breasts.

2. Actual sexual acts, normal or perverted, including intercourse, oral copulation, or sodomy.

3 Actual masturbation.

4 Human genitals in a state of sexual stimulation, arousal, or tumescence.

5 Excretory functions as part of or in connection with any of the activities set forth in Paragraphs 1, 2, 3, or 4 of this definition.

T. *Straddle Dance.* The use by any person, including specifically, but without limitation, an Adult Establishment Employee, of any part of his or her body to deliberately touch the genitals, pubic region, buttock, anus, or female breast of any Adult Establishment patron or any other person, or the deliberate touching of the genitals, pubic region, buttock, anus, or female breast of any person by any Adult Establishment Patron. Conduct shall be a "Straddle Dance" regardless of whether the "touch" or "touching" occurs while the person is displaying or exposing any Specified Anatomical Area. Conduct shall also be a "Straddle Dance" regardless of whether the "touch" or "touching" is direct or through a medium. Conduct commonly referred to by the slang terms "lap dance," "table dance," and "face dance" shall be included within this definition of Straddle Dance.

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Section 4. Adult Use Commissioner and Adult Use Commission.

A. *Adult Use Commissioner.* The chairman of the County Board of the County of Lake is hereby designated as the Adult Use Commissioner pursuant to the terms and conditions of this Ordinance. The Adult Use Commissioner shall have the following powers and duties:

1. To administer and rule upon the applications for, and the issuance, renewal, suspension, and revocation of, Adult Establishment Licenses as set forth in this Ordinance.

2 To conduct or provide for such Inspections of Adult Entertainment Establishments as shall be necessary to determine and ensure compliance with the provisions of this Ordinance and other applicable provisions of law.

3. To periodically review the provisions of this Ordinance and the conduct and operation of Adult Entertainment Establishments and Adult Establishment Licensees, and to make such related reports and recommendations to the County Board as the Adult Use Commissioner shall deem necessary.

4. To appoint County Board Members to serve on the Adult Use Commission as set forth in Subsection B of this Section.

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5. To direct the Adult Use Commission to conduct such hearings, studies, and reports on Adult Entertainment Establishments, and the regulations relating thereto, as the Adult Use Commissioner shall deem necessary.

6. To take such further actions as the Adult Use Commissioner shall deem necessary to carry out the purposes and intent of this Ordinance and to exercise such additional powers in furtherance thereof as are implied or incident to those powers and duties expressly set forth in this Ordinance.

B. Adult Use Commission.

1. Creation. A Commission entitled "Adult Use Commission" is hereby created and established for the purposes set forth in this Ordinance.

2. Composition. The Adult Use Commissioner may appoint one or more current Members of the County Board of the County of Lake to serve at the will of the Adult Use Commissioner and to advise the Adult Use Commissioner on matters relating to the implementation and enforcement of the regulations set forth in this Ordinance and to the exercise of the Adult Use Commissioner's powers and duties under this Ordinance. The person or persons appointed by the Adult Use Commissioner, along with the Adult Use Commissioner, shall comprise the

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Adult Use Commission.

3. Filing of Appointments. The Adult Use Commissioner shall file a written appointment of each of the members of the Adult Use Commission in the Office of the County Clerk of Lake County within five days after each such appointment.

4. Duties. The Adult Use Commission shall have the following powers and duties:

   a. At the direction of the Adult Use Commissioner, to recommend to the Adult Use Commissioner such further regulations regarding Adult Entertainment Establishments and Adult Establishment Licenses as the members of the Commission may deem necessary to protect the public health, safety, and welfare or to otherwise carry out the purposes and objectives of the regulations established pursuant to this Ordinance.

   b. To conduct and prepare hearings, studies, and reports upon matters referred to the Commission by the Adult Use Commissioner and to make such reports and recommendations relating thereto as are requested by the Adult Use Commissioner.

   c. To conduct such hearings on the revocation or suspension of an Adult Establishment License as required pursuant to Section 17 of this Ordinance.

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Section 5. Adult Establishment Licenses Generally.

A. *Adult Establishment License Required.* An Adult Establishment License shall be required to establish, operate, or maintain an Adult Entertainment Establishment within the unincorporated area of Cake County.

B. *Operation Without License Prohibited.* Except as provided in Subsection F of this Section with regard to Adult Entertainment Establishments existing prior to the effective date of this Ordinance, it shall be unlawful for any person not having a current and valid Adult Establishment License to establish, operate, or maintain an Adult Entertainment Establishment within the unincorporated area of Lake County at any time after the effective date of this Ordinance.

C. *Operation in Violation of License Prohibited.* It shall be unlawful for any Licensee to establish, operate, or maintain an Adult Entertainment Establishment within the unincorporated area of Lake County except in the manner authorized by, and in compliance with, the provisions of this Ordinance and the Licensee's Adult Establishment License.

D. *Content and Display of License.* Every Adult Establishment License shall be provided by the County and shall, at a minimum, prominently state on its face the name of the Licensee, the expiration

date, and the address of the Adult Entertainment Establishment. Every Licensee shall cause the Licensee's Adult Establishment License to be framed, covered by glass, and hung at all times in plain view in a conspicuous place on the Licensed Premises so that it can be easily seen and read at any time by any person entering the Licensed Premises.

E. *License Term.* Except as hereinafter provided, Adult Establishment Licenses shall be operative and valid, unless first terminated, suspended, or revoked, for a term of one year commencing on January 1 of the year following the year of issuance and terminating on December 31 of that same year. Adult Establishment Licenses issued after January 1 of any year for operations to commence in that year shall be operative and valid, unless first terminated, suspended, or revoked, for a term commencing on the date of issuance and terminating on December 31 of that same year.

F. *Existing Establishments.* An Adult Entertainment Establishments existing prior to the effective date of this Ordinance (i) shall submit an application for an Adult Establishment License no later than May 11, 1998; (ii) shall cease operations on November 11, 1998, unless it has secured, by that date, an Adult Establishment License pursuant to this Ordinance; and (iii) shall be subject to all other provisions of this ordinance as of November 11, 1998.

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G. *Renewal.* An Adult Establishment License may be renewed only by making application as required for an initial License pursuant to Section 6 of this Ordinance. Application for renewal shall be made at least 30 days before the expiration of the then-current License term. The expiration of the License shall not be affected or extended by a renewal application that Is made less than 30 days before expiration.

H. *Continuation of Commercial Establishment as Non-Adult Entertainment Establishment.* Whenever any Adult Establishment Licensee intends to cease operations of its Commercial Establishment as an Adult Entertainment Establishment but to continue to operate the Commercial Establishment on the Licensed Premises as any Commercial Establishment other than an Adult Entertainment Establishment, the Licensee shall, at least 45 days before the expiration of the then-current License term, notify the Adult Use Commissioner in writing of the change of use. The notification shall include such documents and information, verified by affidavit, necessary to demonstrate that the Commercial Establishment will not be an Adult Entertainment Establishment under the definitions set forth in Subsection 3.B of this Ordinance. Specifically, but without limitation, the Licensee shall provide evidence, verified by affidavit, to the Adult Use Commissioner that such Commercial Establishment will not satisfy any of the criteria set forth In Paragraph 3.B.4 of this Ordinance.

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Section 6. Form and Submittal of License Application.

A. *Required Form.* An application for an Adult Establishment License, or the renewal thereof, shall be made in writing to the Adult Use Commissioner on a form prescribed by the Adult Use Commissioner and shall be signed (i) by the applicant, if the applicant is an individual; (ii) by at least one of the persons entitled to share in the profits of the organization and having unlimited personal liability for the obligations of the organization and for the right to bind all other such persons, if the applicant is a partnership (general or limited), joint venture, or any other type of organization where two or more persons share in the profits and liabilities of the organization; (iii) by a duly authorized agent, if the applicant is a corporation; or (iv) by the trustee, if the applicant is a land trust. The application shall be verified by oath or affidavit as to all statements made on or in connection with the application and any attachments thereto. Each application shall specifically identify the applicant and the Licensed Premises for which an Adult Establishment License is sought. Each initial or renewal application shall be accompanied by seven identical copies.

B. *Administrative Processing Fee.* Every applicant for an Adult Establishment License or for the renewal of an existing Adult Establishment License shall pay an Administrative Processing Fee in the amount of $200 by certified check to the County at the time of

filing such application. The Administrative Processing Fee shall in all cases be non-refundable and shall be deposited in the general corporate fund of the County.

C. *Required information and Documents.* Each application shall include the following information and documents:

1. (a) Individuals: The applicant's legal name, all of the applicant's aliases, the applicant's business address, written proof of the applicant's age, the citizenship and place of birth of the applicant and, if a naturalized citizen, the time and place of the applicant's naturalization.

(b) Corporations: The applicant corporation's complete name and official business address; the legal name, all aliases, and the ages and business addresses of all of the directors, officers, and managers of the corporation and of every person owning or controlling more than 50 percent of the voting shares of the corporation; the corporation's date and place of incorporation and the objects for which it was formed; proof that the corporation is a corporation in good standing and authorized to conduct business in the State of Illinois; and the name of the registered corporate agent and the address of the registered office for service of process.

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(c) Partnerships (general or limited), joint ventures, or any other type of organization where two or more persons share in the profits and liabilities of the organization: the applicant organization's complete name and official business address; the legal name, all aliases, and the ages and business addresses of each partner (other than limited partners) or any other person entitled to share in the profits of the organization, whether or not any such person is also obligated to share in the liabilities of the organization.

(d) Land trusts: The applicant land trust's complete name; the legal name, all aliases, and the business address of the trustee of the land trust; the legal name, all aliases, and the ages and business addresses of each beneficiary of the land trust and the specific interest of each such beneficiary in the land trust; and the interest, if any, that the land trust holds in the Licensed Premises.

2. If a corporation or partnership is an interest holder that must be disclosed pursuant to Subparagraph 6.C.1(b) or 6.C.1(c) above, then such interest holders shall disclose the information required in said Subparagraphs with respect to their interest holders.

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3. The general character and nature of the business of the applicant.

4. The length of time that the applicant has been in the business of the character specified in response to Paragraph 3 above.

5. The location, including street address and legal description, and telephone number, of the premises for which the Adult Establishment License is sought.

6. The specific name of the business that is to be operated under the Adult Establishment License.

7. The identity of each fee simple owner of the Licensed Premises.

8. A diagram showing the internal and external configuration of the Licensed Premises, including all doors, windows, entrances, exits, the fixed structural internal features of the Licensed Premises, plus the interior rooms, walls, pacitions, stages, performance areas, and restrooms. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; provided, however, that each diagram shall be oriented to the north or to some designated street or object and shall be drawn to a designated scale or with marked dimensions to an accuracy of

plus or minus six inches and sufficient to show clearly the various interior dimensions of all areas of the Licensed Premises and to demonstrate compliance with the provisions of this Ordinance. The requirements of this Paragraph shall not apply for renewal applications if the applicant adopts a diagram that was previously submitted for the License sought to be renewed and if the Licensee certifies that the Licensed Premises has not been altered since the irnmediately preceding issuance of the License and that the previous diagram continues to accurately depict the exterior and interior layouts of the Licensed Premises. The approval or use of the diagram required pursuant to this Paragraph shall not be deemed to be, and shall not be interpreted or construed to constitute, any other County approval otherwise required pursuant to applicable County ordinances and regulations.

9. The specific type or types of Adult Entertainment Establishment(s) that the applicant proposes to operate in the Licensed Premises.

10. A copy of each Adult Establishment License or any license substantially the same as an Adult Establishment License currently held by the applicant, or any of the individuals identified in the application pursuant to Paragraphs 1 or 2 of this Subsection.

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11. Whether the applicant, or any of the individuals identified in the application pursuant to Paragraphs 1 or 2 of this Subsection, has had a license or other authorization to conduct or operate a business substantially the same as an Adult Entertainment Establishment revoked or suspended, and, if so, the date and grounds for each such revocation or suspension, and the name and location of the establishment at issue.

12. The name of the individual or individuals who shall be the day-to-day, on-site managers of the proposed Adult Entertainment Establishment. If the manager is other than the applicant, the applicant shall provide, for each manager, all of the information required pursuant to Subparagraph 1(a) and Paragraphs 10 and 11 above.

D. *Incomplete Applications Returned.* Any application for an Adult Establishment License that does not include all of the information and documents required pursuant to Subsection C of this Section as well as the Administrative Processing Fee required pursuant to Subsection B of this Section, shall be deemed to be incomplete and shall not be add on or processed by the County. The Adult Use Commissioner shall, within five days of such submittal, return the incomplete application to the applicant along with a written explanation of the reasons why the application is incomplete.

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Section 7. Processing of License Application.

A. *Reviewing Departments.* Within three days after receipt of a complete application for an Adult Establishment License that includes all of the Information and documents required pursuant to Subsection 6.C of this Ordinance as well as the Administrative Processing Fee required pursuant to Subsection 6.B of this Ordinance, the Adult Use Commissioner shall transmit a copy of the application to the Reviewing Departments.

B. *Reviewing Department Reports.* Each of the Reviewing Departments shall, within 25 days after transmittal of the application thereto, (i) review the application; (ii) conduct such inspections of the proposed Licensed Premises and background investigations of the applicant and any of the individuals identified in the application pursuant to Paragraphs 6.C.1, 6.C.2, or 6.C.12 of this Ordinance, regarding matters within their respective jurisdictions, as shall be reasonably necessary to verify the information set forth in the application and to determine whether the proposed Adult Entertainment Establishment and Licensed Premises comply with the requirements of this Ordinance and other applicable laws, codes, ordinances, rules, and regulations; and (iii) prepare and submit to the Adult Use Commissioner a written report regarding the results and findings of such reviews, inspections, and investigations.

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C. *Adult Use Commissioner Review.* The Adult Use Commissioner shall also conduct such inspections and investigations as the Adult Use Commissioner shall deem reasonably necessary to verify the information set forth in the application and to determine whether the proposed Adult Entertainment Establishment and Licensed premises comply with the requirements of this Ordinance and other applicable laws, codes, ordinances, rules, and regulations.

D. *Reliance on Diagram.* In the event that the licensed Premises has not yet been constructed or reconstructed to accommodate the proposed Adult Entertainment Establishment, the Adult Use Commissioner and the Reviewing Departments shall base their respective written reports, investigations, and inspections to the extent necessary, on the diagram submitted pursuant to Paragraph 6.C.8 of this Ordinance. Any Adult Establishment License Issued prior to the construction or reconstruction necessary to accommodate the proposed Adult Entertainment Establishment shall contain a condition that the Adult, Entertainment Establishment shall not open for business until the Licensed Premises has been inspected and determined to be in substantial compliance with the diagram submitted with the application.

E. *Applicant Cooperation Required.* An applicant for an Adult Establishment License shall cooperate fully

in the inspections and investigations conducted by the Adult Use Commissioner and the Reviewing Departments. The applicant's failure or refusal (i) to give any information reasonably relevant to the investigation of the application; (ii) to allow the Licensed Premises to be inspected; (iii) to appear at any reasonable time and place for examination under oath regarding the application; or (iv) to otherwise cooperate with the investigation and inspection required by this Ordinance, shall constitute an admission by the applicant that the applicant is ineligible for an Adult Establishment License and shall be grounds for denial of the License by the Adult Use Commissioner.

F. *Time for issuance or Denial.* The Adult Use Commissioner shall, within 30 days after submittal of a properly completed application, either issue an Adult Establishment License pursuant to the provisions of Subsection 8.A of this Ordinance or deny issuance of the Adult Establishment License pursuant to the provisions of Subsection 8.B of this Ordinance. The Adult Use Commissioner shall issue or deny the License within said 30-day period regardless of whether or not the Adult Use Commissioner has received all of the Reviewing Department reports.

G. *Decision Final.* The action taken by the Adult Use Commissioner to issue an Adult Establishment License pursuant to Subsection 8.A of this Ordinance or to deny issuance of an Adult

Establishment License pursuant to Subsection 8.B of this Ordinance shall be final and shall be subject to judicial review.

Section 8. Standards for issuance or Denial of License.

A. *Issuance.* The Adult Use Commissioner shall issue an Adult Establishment License to an applicant if, but only if, the Adult Use Commissioner finds and determines all of the following, based on the reports, investigations, and inspections conducted by the Adult Use Commissioner and the Reviewing Departments and on any other credible information on which it is reasonable for the Adult Use Commissioner to rely.

1. All information and documents required by Section 6 of this Ordinance for issuance of an Adult Establishment License have been properly provided and the material statements made in the application are true and correct.

2. For Adult Stores and Adult Theaters, all persons identified in the application pursuant to Paragraphs 6.C.1, 6.C.2, or 6.C.12 of this ordinance are at least 18 years of age and not under any legal disability. For Adult Cabarets, all persons identified in the application pursuant to Paragraphs 6.C.1, 6.C.2, or 6.C.12 of this Ordinance are at least 21 years of age and not under any legal disability.

3. No person identified in the application pursuant to Paragraphs 6.C.1, 6.C.2, or 6.C.12 of this Ordinance is residing with, or married to, a person (i) who has been denied an Adult Establishment License on the Licensed Premises within 12 months immediately preceding the date of the application, (ii) whose Adult Establishment License for the Licensed Premises has been revoked within 12 months immediately preceding the date of the application, or (iii) whose Adult Establishment License is currently under suspension at the time of application.

4. The Adult Entertainment Establishment and the Licensed Premises, and the proposed operation of the Adult Entertainment Establishment, comply with all then-applicable building, health, and life safety codes and regulations and have received all necessary zoning approvals required pursuant to the then-applicable provisions of the County Unified Development Ordinance, including specifically, but without limitation, the zoning certificate required for the Adult Entertainment Establishment.

5. The applicant has confirmed in writing and under oath as part of the application that the applicant has read this Ordinance and all provisions of the County Unified Development Ordinance applicable to Adult Entertainment

Establishments, that the applicant is familiar with their terms and conditions, and that the Licensed Premises and the proposed Adult Entertainment Establishment and its proposed operation are and shall be in compliance therewith.

B. *Denial.* If the Adult Use Commissioner determines that the applicant has not met any one or more of the conditions set forth in Subsection A of this Section, then the Adult Use Commissioner shall deny issuance of the Adult Establishment License and shall give the applicant a written notification and explanation of such denial. The Adult Use Commissioner's notice of denial shall be delivered in person or by certified U.S. mail, postage prepaid, return receipt requested, addressed to the applicant's address as set forth in the application. With regard to a license application for a new Adult Entertainment Establishment, the Adult Establishment License shall be deemed denied on the day that the notice of denial is delivered in person or three days after it is placed in the U.S. mail as provided in this Subsection. With regard to an application for renewal of an existing Adult Entertainment Establishment License, in order to allow an aggrieved Licensee an opportunity to obtain judicial review, any such denial shall take effect (i) on the 14th day after the Adult Use Commissioner's written decision is delivered in person or (ii) on the 17th day after the Adult Use Commissioner's written decision is placed in the U.S. mail as provided in this paragraph.

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C. *License Deemed To Be Issued.* If the Adult Use Commissioner does not issue or deny the Adult Establishment License within 30 days after the properly completed application is submitted, then the Adult Establishment License applied for shall be deemed to have been issued.

Section 9. Inspections by the County.

A. *Authority.* The Adult Use Commissioner and other County representatives and departments with jurisdiction shall periodically inspect all Adult Entertainment Establishment as shall be necessary to determine compliance with the provisions of this Ordinance and all other applicable law.

B. *Licensee Cooperation.* A Licensee shall permit representatives of the County to inspect the Licensed Premises and the Adult Entertainment Establishment for the purpose of determining compliance with the provisions of this Ordinance and ail other applicable law at any time during which the Licensed Premises is occupied or the Adult Entertainment Establishment is open for business.

C. *Interference or Refusal Illegal.* It shall be unlawful for the Licensee, any Adult Establishment Employee, or any other person to prohibit, interfere with, or refuse to allow, any lawful inspection conducted by the County pursuant to this Ordinance or any other authority.

D. *Suspension or Revocation.* Any such prohibition, interference, or refusal shall be grounds for suspension or revocation of the Adult Establishment License pursuant to Section 17 of this Ordinance.

Section 10. Change in Information.

During the pendency of any application for, or during the term of, any Adult Establishment License, the applicant or Licensee shall promptly notify the Adult Use Commissioner in writing (i) of any change in any material information given by the applicant or Licensee in the application for such License, including specifically, but without limitation, any change in managers of the Adult Entertainment Establishment or in the individuals identified in the application pursuant to Paragraphs 6.C.1 or 6.C.2 of this Ordinance; or (ii) if any of the events specified in Subsection 17.A of this Ordinance occur.

Section 11. Regulations Applicable To All Adult Entertainment Establishments.

A. *General Compliance.* All Licensed Premises and Adult Entertainment Establishments shall comply with the provisions of this Ordinance; all other applicable County ordinances, resolutions, rules, and regulations; and all other applicable federal, state, and local laws.

B. *Hours of Operation.* No Adult Entertainment Establishment shall be open for business at any time between the hours of 12:00 a.m and 12:00 noon on

any weekday or Saturday. No Adult Entertainment Establishment shall be open for business at any time on any Sunday or on any legal State of Illinois or federal holiday.

C. *Animals.* No animals, except only for seeing-eye dogs required to assist a blind Adult Establishment Patron, shall be permitted at any time at or in any Adult Entertainment Establishment or Licensed Premises. Any such seeing-eye dog must at all times remain at the side of the blind Adult Establishment Patron.

D. *Restrooms.* All restrooms in Adult Entertainment Establishments shall be equipped with standard toilets, sinks, and other traditional lavatory facilities. No Adult Materials or live performances shall be provided or allowed at any time in the restrooms of an Adult Entertainment Establishment. Separate male and female restrooms shall be provided for and used by Adult Establishment Employees and Adult Establishment Patrons.

E. *Restricted Access.* No Adult Patron shall be permitted at any time to enter into any of the non-public portions of any Adult Entertainment Establishment, including specifically, but without limitation, any storage areas or dressing or other rooms for the benefit of Adult Establishment Employees. This subsection shall not apply to persons delivering goods and materials, food and beverages; or performing maintenance or repairs to

the Licensed Premises; provided, however, that any such persons shall remain in such non-public areas only for the purposes and to the extent and time necessary to perform their job duties.

F. *Specific Prohibited Acts.*

1. No Adult Establishment Employee or any other person at any Adult Entertainment Establishment shall appear, be present, or perform while Nude.

2. No Adult Establishment Employee or any other person at any Adult Entertainment Establishment shall perform or conduct any Specified Sexual Activity with or upon any Adult Establishment Patron or any other Adult Establishment Employee or any other person. No Adult Establishment Patron or any other person at any Adult Entertainment Establishment shall perform or conduct any Specified Sexual Activity with or for any Adult Establishment Employee or any other Adult Establishment Patron or any other person.

3. Straddle Dances shall be prohibited at all Adult, Entertainment Establishments.

G. *Exterior Display.* No Adult Entertainment Establishment shall be maintained or operated in any manner that causes, creates, or allows public viewing of any Adult Material, or any entertainment depicting, describing, or relating to Specified Sexual

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Activities or Specified Anatomical Areas, from any sidewalk, public or private right-of-way, or any property other than the lot on which the Licensed Premises is located. No portion of the exterior of an Adult Entertainment Establishment shall utilize or contain any flashing lights, search lights, or spotlights, or any other similar lighting systems, or any words, lettering, photographs, silhouettes, drawings, or pictorial representations of any manner except to the extent specifically allowed pursuant to Subsection I of this Section with regard to signs, This Subsection shall apply to any advertisement, display, promotional material, decoration, or sign; to any performance or show; and to any window, door, or other opening.

H. *Signage Limitations.* All signs for Adult Entertainment Establishments shall be flat wall signs. The maximum allowable sign area shall be one square foot of sign area per foot of lot frontage on a street, but in no event exceeding 32 square feet. The maximum number of signs shail be one per lot frontage. Signs otherwise permitted pursuant to this Ordinance shall contain only (i) the name of the Adult Entertainment Establishment and/or (ii) the specific type of Adult Entertainment Establishment conducted on the licensed Premises. Temporary signage shall not be permitted in connection with any Adult Entertainment Establishment.

I. *Noise.* No loudspeakers or sound equipment audible beyond the Licensed Premises shail be used at any time.

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J. *Gambling and Related Devices Prohibited.* No Adult Entertainment Establishment shall contain any video, pinball, slot, bagatelle, pigeon-hole, pool, or any other games, machines, tables, or implements.

K. *Manager's Station.* Each Adult Entertainment Establishment shall have one or more manager's stations. The interior of each Adult Entertainment Establishment shall be configured in such a manner that there is a direct and substantially unobstructed view from at least one manager's station to every part of each area, except restrooms, of the Establishment to which any Adult Establishment Patron is permitted access for any purpose.

. L. *Alcohol Prohibition.* No alcoholic liquor of any kind shall be sold, used, consumed, or possessed at any time on any Licensed Premises or at any Adult Entertainment Establishment.

Section 12. Special Regulations For Adult Booths.

A. *Prohibited Except In Adult Stores.* Adult Booths shall be prohibited in all Adult Entertainment Establishments except Adult Stores.

B. *Occupancy and Prohibited Acts.* Only one individual shall occupy an Adult Booth at any one time: No individual occupying an Adult Booth shall engage in any Specified Sexual Activities. No individual shall damage or deface any portion of an Adult Booth.

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C. *Open Booth Requirement.* In addition to satisfying the requirement of Subsection 11.K of this Ordinance, all Adult Stores containing Adult Booths shall be physically arranged in such a manner that the entire interior portion of each Adult Booth shall be visible from the common area of the Adult Store. To satisfy this requirement, there shall be a permanently open and unobstructed entranceway for each Adult Booth and for the entranceway from the area of the Adult Store that provides other Adult Materials to the area of the Adult Store containing the Adult Booths. Each of these entranceways shall not be capable of being closed or obstructed, entirely or partially, by any door, curtain, partition, drapes, or any other obstruction whatsoever that would be capable of wholly or partially obscuring the area of the Adult Store containing the Adult Booths or any person situated in an Adult Booth. It shall be unlawful to install Adult Booths within an Adult Entertainment Establishment for the purpose of providing secluded viewing of Adult Materials or live performances.

D. *Aisle Required.* There shall be one continuous lighted main aisle along side the Adult Booths provided in any Adult Store. Each person situated in a Booth shall be visible at all times from the aisle.

E. *Holes Prohibited.* Except for the open Booth entranceway, the walls and partitions of each Adult Booth shall be constructed and maintained of solid walls or partitions without any holes or openings whatsoever.

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F. *Signage.* A sign shall be posted in a conspicuous place at or near the entranceway to each Adult Booth that states (i) that only one person is allowed in an Adult Booth at any one time, (ii) that it is unlawful to engage in any Specified Sexual Activities while in an Adult Booth, and (iii) that it is unlawful to damage or deface any portion of an Adult Booth.

G. *Age Limitations.*

1. No Adult Establishment Employee or Adult Establishment Patron at an Adult Booth or a Licensed Premises that includes an Adult Booth shall be under the age of 18.

2. No person under the age of 18 shall be admitted to any Adult Booth or any Licensed Premises that includes and Adult Booth.

3. No person under the age of 18 shall be allowed or permitted to remain at any Adult Booth or at any Licensed Premises that includes an Adult Booth.

4. No person under the age of 18 shall be allowed or permitted to purchase or receive, whether for consideration or not, any Adult Material or other goods or services at or from any Adult Booth or any Licensed Premises that includes an Adult Booth.

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Section 13. Special Regulations For Adult Cabarets.

A. *Performance Area.* The performance area of an Adult Cabaret shail be limited to one or more stages or platforms permanently anchored to the floor (a "Cabaret Stage"). Each Cabaret Stage shall be at least 18 inches in elevation above the level of the patron seating areas. Each Cabaret Stage shall be separated by a distance of at least eight feet from all areas of the premises to which Adult Entertainment Patrons have access. A continuous barrier at least three feet in height and located at least eight feet from all points of each Cabaret Stage shall separate each Cabaret Stage from all patron seating areas. The barrier shall consist of horizontal or vertical members spaced no more than nine inches apart and nine inches from the floor or the walls to which it is attached.

B. *Lighting.* Sufficient lighting shill be provided and equally distributed throughout the public areas of the Adult Cabaret so that all objects are plainly visible at all times. A minimum lighting level of not less than 30 lux horizontal, measured at 30 inches from the floor and on 10-foot centers shall be maintained at all times for all areas of the Adult Cabaret where Adult Establishment Patrons are admitted.

C. *Tipping.* No tip or gratuity from any Adult Establishment Patron may be offered or accepted for any performance by an Adult Establishment

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Employee on any Adult Cabaret Stage at any time prior to the completion of any such performance. No Adult Establishment Patron shall offer, and no Adult Establishment Employee having performed on any Cabaret Stage shall accept, any form of tip or gratuity offered directly to the Employee by the Adult Establishment Patron. Rather, following completion of a performance, all tips and gratuities to Adult Establishment Employees performing on any Cabaret Stage shall be placed into a receptacle provided for receipt of such tips and gratuities by the Adult Entertainment Establishment.

D. *Notice of Select Rules.* A sign at least two feet by two feet, with letters at least one inch high shall be conspicuously displayed on or adjacent to every Cabaret Stage stating the following:

THIS ADULT CABARET IS REGULATED BY THE COUNTY OF LAKE ENTERTAINERS ARE:

1. NOT PERMITTED TO ENGAGE IN ANY TYPE OF SEXUAL CONDUCT.

2. NOT PERMITTED TO APPEAR IN A STATE OF NUDITY.

2 NOT PERMITTED TO ACCEPT TIPS OR GRATUITIES FOR ANY PERFORMANCE UNTIL AFTER COMPLETION OF THE PERFORMANCE.

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4. NOT PERMITTED TO ACCEPT ANY TIPS DIRECTLY FROM PATRONS EVEN AFTER COMPLETION OF THE PERFORMANCE. ANY SUCH TIPS MUST BE PLACED INTO THE RECEPTACLE PROVIDED BY MANAGEMENT.

E. *Age Limitations.*

1. No Adult Establishment Employee or Adult Establishment Patron at an Adult Cabaret or a Licensed Premises used for an Adult Cabaret shall be under the age of 21.

2. No person under the age of 21 shall be admitted to any Adult Cabaret or to any Licensed Premises used for an Adult Cabaret.

3. No person under the age of 21 shall be allowed or permitted to remain at any Adult Cabaret or any Licensed Premises used for an Adult Cabaret.

4. No person under the age of 21 shall be allowed or permitted to purchase or receive, whether for consideration or not, any Adult Material or other goods or services at or from any Adult Cabaret or any Licensed Premises used for an Adult Cabaret.

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Section 14. Special Regulation For Adult Stores.

A. *Windows and Signs.* Window areas for Adult Stores shall not be covered or obstructed in any way. No signs or other obstructions shall be placed In the windows.

B. *Age Limitations.*

1. No Adult Establishment Employee or Adult Establishment Patron at an Adult Store or a Licensed Premises used for an Adult Store shall be under the age of 18.

2. No person under the age of 18 shall be admitted to any Adult Store or to any Licensed Premises used for an Adult Store.

3. No person under the age of 18 shall be allowed or permitted to remain at any Adult Store or any Licensed Premises used for an Adult Store.

4. No person under the age of 18 shall be allowed or permitted to purchase or receive, whether for consideration or not, any Adult Material or other goods or services at or from any Adult Store or any Licensed Premises used for an Adult Store.

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Section 15. Special Regulations For Adult Theaters.

A. *Seating.* Each Adult Theater shall provide seating only in individual chairs with arms or in seats separated from each other by immovable arms and not on couches, benches, or any other multiple person seating structures. The number of seats shail equal the maximum number of persons who may occupy the Adult Theater.

B. *Aisle.* Each Adult Theater shall have a continuous main aisle alongside the seating area in order that each person seated in the Adult Theater shail be visible from the aisle at ail times.

C. *Sign.* Each Adult Theater shall have a sign posted in a conspicuous place at or near each entranceway to the auditorium or similar area that lists the maximum number of persons who may occupy the auditorium area, which number shall not exceed the number of seats in the auditorium area.

D. *Age Limitations.*

1 No Adult Establishment Employee or Adult Establishment Patron at an Adult Theater or a Licensed Premises used for an Adult Theater shall be under the age of 18.

2 No person under the age of 18 shall be admitted to any Adult Theater or to any Licensed Premises used for an Adult Theater.

3. No person under the age of 18 shall be allowed or permitted to remain at any Adult Theater or any Licensed Premises used for an Adult Theater.

4. No person under the age of 18 shall be allowed or permitted to purchase or receive, whether for consideration or not, any Adult Material or other goods or services at or from any Adult Theater or any Licensed Premises used for an Adult Theater.

Section 16. Licensee Responsibility For Employees.

Every act or omission by an Adult Establishment Employee constituting a violation of the provisions of this Ordinance shall be deemed to be the act or omission of the Licensee if such act or omission occurs either with the authorization, knowledge, or approval of the Licensee, or as a result of the Licensee's negligent failure to supervise the Adult Establishment Employee. The Licensee shall be punishable for any such act or omission in the same manner as if the Licensee committed the act or caused the omission. Accordingly, any such act or omission of any such Employee constituting a violation of the provisions of this Ordinance shall be deemed, for purposes of determining whether the Licensee's Adult Establishment License shall be revoked, suspended, or renewed, to be the act or omission of the Licensee.

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Section 17. License Revocation or Suspension.

A. *Grounds.* Pursuant to the procedures set forth in Subsection B of this Section, the Adult Use Commissioner may suspend for not more than 30 days, or revoke, any Adult Establishment License if the Adult Use Commissioner, based on credible and reasonably reliable information and evidence, determines that any one or more of the following has occurred:

1. The Licensee has violated any of the provisions or requirements of this Ordinance or the Adult Establishment License issued pursuant herein, or the provisions of the County Unified Development Ordinance applicable to the Licensed Premises or the Adult Entertainment Establishment.

2. The Licensee (i) knowingly or negligently furnished false or misleading information or withheld information on any application or other document submitted to the County for the issuance or renewal of any Adult Establishment License or (ii) knowingly or negligently caused or suffered any other person to furnish or withhold any such information on the Licensee's behalf.

3. The Licensee has committed a felony or Specified Criminal Act on the Licensed Premises.

4.. The Licensee authorizes, approves, or, as a result of the Licensee's negligent failure to supervise the Licensed Premises or the Adult Entertainment Establishment, allows, an Adult Establishment Employee, an Adult Establishment Patron, or any other person to (i) violate any of the provisions or requirements of this Ordinance or of the provisions or requirements of the Adult Establishment License issued pursuant hereto, or (ii) commit any felony or Specified Criminal Act on the Licensed Premises.

5. The Licensee, or any person identified pursuant to Paragraphs 6.C.1, 6.C.2, or 6.C.12 of this Ordinance becomes disqualified for the issuance of an Adult Establishment License at any time during the term of the License at issue.

B. *Procedure.* An Adult Entertainment Establishment License may be suspended for not more than 30 days or revoked pursuant to the terms and conditions set forth in this Subsection B.

1. Notice. Upon determining that one or more of the grounds for suspension or revocation under Subsection A of this Section may exist, the Adult Use Commissioner shall serve a written notice on the Licensee in person or by certified U.S. mail, postage prepaid, return receipt requested, addressed to the Licensee's address as set forth in the Licensee's application. The

written notice shall, at a minimum, (i) state that Adult Use Commissioner has determined that the Adult Establishment License may be subject to suspension or revocation pursuant to Subsection 17.A of this Ordinance; (ii) identify the specific grounds for the Adult Use Commissioner's determination; and (iii) set a date for a hearing regarding the Adult Use Commissioner's determination as to the possibility of suspension or revocation of the Adult Establishment License. The date of the hearing shall be no less than five days after service of the Adult Use Commissioner's notice, unless an earlier date is agreed to by the Licensee and the Adult Use Commissioner.

2. *Hearing*. The hearing shall be conducted by the Adult Use Commissioner, or, at the Adult Use Commissioner's direction, by the Adult Use Commission. At the hearing, the Licensee may present and submit evidence and witnesses to refute the grounds cited by the Adult Use Commissioner for suspending or revoking the License and the County and any other persons may submit evidence to sustain such grounds. The administrative record compiled on the Adult Entertainment Establishment pursuant to Section 18 of this Ordinance shall be made part of the hearing record. Within three days after the close of the hearing, the Adult Use Commissioner shall, having considered the record made at the hearing, render a decision

in writing, setting forth the reasons for the decision. The action taken by the Adult Use Commissioner shall be final and shall be subject to judicial review.

3. Notice and Effective Date of Suspension or Revocation. The Adult Use Commissioner's written decision shall be posted at the office of the Adult Use Commissioner and shall be served on the Licensee in person or by certified U.S. mail, postage prepaid, return receipt requested, addressed to the Licensee's address as set forth in the Licensee's application. In order to allow an aggrieved Licensee an opportunity to obtain judicial review, any such suspension or revocation, as the case may be, shall take effect (i) on the 14th day after the Adult Use Commissioner's written decision is delivered in person or (ii) on the 17th day after the Adult Use Commissioner's written decision is placed in the U.S. mail as provided in this paragraph.

4. Surrender of License. Upon the suspension or revocation of an Adult Establishment License pursuant to this Ordinance, the Adult Use Commissioner shall take custody of the suspended or revoked License.

Appendix D

Section 18. Administrative Record.

The Adult Use commissioner shall cause to be kept in the Adult Use Commissioner's office an accurate record of every Adult Establishment License application received and acted on, together with all relevant information and material pertaining to such application, any Adult Establishment License issued pursuant thereto, and any Adult Entertainment Establishment operated pursuant to such Adult Establishment License.

Section 19. Employee Registration and Recordkeeping by Licensee.

A. *Registration.* The Licensee of every Adult Entertainment Establishment shall register each of the Licensee's Adult Establishment Employees with the Adult Use Commissioner by providing the following information to the Adult Use Commissioner no later than the business day immediately preceding the day of commencement of the Employee's employment at the Adult Entertainment Establishment:

1. Legal name.

2. Date of birth.

3. Gender, height, weight, hair and eye color.

4. Date of commencement of employment.

Appendix D

5. Specific job or employment duties.

6. The names of each governmental body, including the County, from which, within three years immediately preceding the date of registration, the Employee has received an Adult Establishment License, or any other official authorization to operate or to be employed at an Adult Entertainment Establishment or a business substantially the same as an Adult Entertainment Establishment. For each such license or authorization, the Licensee shall provide the name and address of the business.

7. Whether the Employee has had any such license or authorization revoked or suspended, and, if so, the date and grounds for each such revocation or suspension, and the name and location of the establishment at issue.

B. *Employee Register.* The Licensee if every Adult Entertainment Establishment shall maintain a register of all of its Adult Establishment Employees. For each such Employee, the register shall include the following information:

1. Legal name.

2. Date of birth.

3. Gender.

4. Date of commencement of employment.

5. Date of employment termination, if applicable.

6. Specific job or employment duties.

The register shall be maintained for all current employees and ail employees employed at any time during the preceding 36 months. The Licensee shall make the register of its Adult Establishment Employees available for inspection by the County immediately upon demand at all reasonable times.

Section 20. Penalty.

Any person who violates, neglects, refuses to comply with, or assists or participates in any way in the violation of, any of the provisions or requirements of this Ordinance or of any of the provisions or requirements of any Adult Establishment License, shall be fined not more than $500 for each such violation. Each day such violation continues shall constitute a separate offense. The Adult Use Commissioner shall give written notice to any such person of any such violation and the fine imposed by serving a citation in person or by certified U.S. mail, postage prepaid, return receipt requested, addressed to the Licensee's address as set forth in the Licensee's application.

Appendix D

Section 21. Nuisance Declared.

Any Adult Entertainment Establishment established, operated, or maintained in violation of any of the provisions or requirements of this Ordinance or of any Adult Establishment License shall be, and the same is, declared to be unlawful and a public nuisance. The County may, in addition to or in lieu of any other remedies set forth in this Ordinance, commence an action to enjoin, remove, or abate such nuisance in the manner provided by law and shall take such other steps and apply to such court or courts as may have jurisdiction to grant such relief as will abate or remove such public nuisance, and restrain and enjoin any person from establishing, operating, or maintaining an Adult Entertainment Establishment contrary to the provisions of this Ordinance.

Section 22. Computation of Time.

Unless otherwise specifically set forth in this Ordinance, the time within which any act required by this Ordinance is to be done shall be computed by excluding the first day and including the last day, unless the last day is Saturday, Sunday or a Federal or State of Illinois holiday, in which case it shall also be excluded. If the day immediately following such Saturday, Sunday, or holiday is also a Saturday, Sunday, or holiday, then such succeeding day shall also be excluded.

Appendix D

Section 23. Severability.

In the event that any provision of this Ordinance, or any part thereof, or any application thereof to any person or circumstance, is for any reason held to be unconstitutional or otherwise invalid or ineffective by any court of competent jurisdiction on its face or as applied, such holding shall not affect the validity or effectiveness of any of the remaining provisions of this Ordinance, or any part thereof, or any application thereof to any person or circumstance or of said provision as applied to any other person or circumstance. It is hereby declared to be the legislative intent of the County that this Ordinance would have been adopted had such unconstitutional, invalid, or ineffective provisions not been included herein.

Section 24. Effective Date.

This Ordinance shall be in full force and effect from and after its passage and approval by the County Board.

Section 3. Severability.

In the event that any provision of this Ordinance, or any part thereof, or any application thereof to any person or circumstance, is for any reason held to be unconstitutional or otherwise invalid or ineffective by any court of competent jurisdiction on its face or as applied, such holding shall not affect the validity or effectiveness of any of the remaining provisions of this Ordinance, or the Licensing Ordinance, or any part thereof, or any application thereof to any person or circumstance or of said provision as applied to any other

person or circumstance. It is hereby declared to be the legislative intent of the County that this Ordinance and the Licensing Ordinance would have been adopted had such unconstitutional, invalid, or ineffective provisions not been included herein.

Section 4. Effective Date.

This Ordinance shall be in full force and effect from and after its passage and approval by the County Board.

APPROVED:

s/ [illegible]
Chairman
Lake County Board

ATTEST:

s/ William R. Helander
Lake County Clerk

ADOPTED: February 10, 1998
AMENDED: October 9, 2001

(2)

Supreme Court, U.S.
FILED
APR 3 - 2006
OFFICE OF THE CLERK

No. 05-1113

In The
Supreme Court of the United States

XLP CORPORATION, et al.,

Petitioners,

v.

COUNTY OF LAKE, ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Illinois Appellate Court For The Second Judicial District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Illinois state trial and appellate courts made erroneous factual findings based on the evidence introduced at trial in support of Lake County, Illinois' adult use regulations.

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STATEMENT OF THE CASE

I. Introduction

Petitioners challenge the constitutionality of Lake County's adult use ordinance. After a six-day evidentiary trial, the trial court upheld the constitutionality of the ordinance. In its ruling, the trial court made detailed findings of fact concerning the connection between Lake County adult uses and the negative secondary effects that the ordinance was designed to address. Petitioners now ask this Court to reweigh that same extensive evidence and reach a different conclusion than the state trial and appellate courts.

II. Factual Background

On February 10, 1998, the Lake County, Illinois Board of Commissioners adopted the Lake County Adult Use Ordinance (the "Ordinance"). The Ordinance defines and requires County licensure of all "adult cabarets," "adult stores," and "adult theaters" within unincorporated Lake County. The preamble to the Ordinance sets forth, in 19 detailed recitals, the reasons the Lake County Board adopted the Ordinance. Specifically, the stated purposes of the Ordinance are to: (1) reduce crime; (2) prevent the spread of AIDS and other communicable or sexually related diseases; (3) prevent unsanitary, unsafe, and unhealthy conditions at adult establishments; (4) protect the property values, character, and quality of residential neighborhoods; (5) protect businesses and commercial uses; (6) protect minors and students from the negative effects of adult uses; and (7) protect special uses such as schools, parks, playgrounds, forest preserves, places of

worship, and cemeteries from being adversely impacted by adult uses.

On October 9, 2001, the Lake County Board amended the Ordinance "in its entirety." Petition, Appendix D, p. 33a. The preamble to the amendment states that the amendment was necessary to ensure the constitutionality of the Ordinance in light of "recent court cases [that] have found unconstitutional certain provisions of adult entertainment licensing ordinances, particularly with respect to the definitions of various types of establishments, licensing disclosure, issuance and denial requirements." Petition, Appendix D, p. 31a. Specifically, the County Board noted that in the case *Wisconsin Vendors, Inc. v. County of Lake*, Case No. 99 C 8340, a federal trial court had issued a preliminary injunction against the County, "making a preliminary finding that the definition of 'adult entertainment establishment' in the Ordinance, as originally adopted, may be impermissibly vague."[1]

The Ordinance, as amended, sets forth a detailed Adult Establishment License application process, specifically identifying the information that must be provided to the County in connection with a License application (Section 6) (Petition, Appendix D, pp. 49a-54a), setting forth the specific criteria the County will use in reviewing the License application (Section 7) (Petition, Appendix D, pp. 55a-58a), and setting forth the exclusive grounds that

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[1] The federal trial court in that case subsequently entered summary judgment in favor of the County, finding that the definition of "adult entertainment establishment" in the original Ordinance was, in fact, not unconstitutionally vague. *See Wisconsin Vendors, Inc. v. County of Lake*, 2003 U.S. Dist. Lexis 2310, at *13, Case No. 99 C 8340 (N.D.Ill. Feb. 18, 2003).

require the denial of a License (Section 8) (Petition, Appendix D, pp. 58a-61a). Sections 11 through 15 contain regulations governing the operation of the specific types of adult uses. Petition, Appendix D, pp. 62a-74a. The amendment did not change any of the operational regulations governing adult uses (Sections 11 through 15) that had been set forth in the 1998 Ordinance. Petition, Appendix D, pp. 62a-74a.

The County Board also reaffirmed that "the rationale for the [original] Licensing Ordinance, as set forth in the recitals to the [original] Licensing ordinance, are equally applicable to the amendments adopted pursuant to this ordinance." Petition, Appendix D, p. 32a.

When the County Board adopted the Ordinance amendments in 2001, the Board heard testimony from County representatives. Specifically, Richard Eckenstahler, the Chief of Operations for the Lake County Sheriff, reported to the Board on two recent undercover operations conducted by Lake County Sheriff's deputies – one resulted in the conviction of four individuals for prostitution and solicitation at an adult cabaret (one of the Petitioners), the other resulted in the conviction of two other individuals at a second adult cabaret (the other Petitioner) in unincorporated Lake County for prostitution and solicitation.

Eckenstahler also provided the County Board a summary report reflecting over 200 police reports and over 400 calls for police assistance at adult uses within unincorporated Lake County from 1979 to 2001. Contrary to Petitioners' contention, the trial testimony revealed that this summary report was distributed and presented to the County Board at the time they adopted the amended

Ordinance in October 2001. Eckenstahler reported that based on his review of the summary report and his personal experience of over 23 years of police work for the Lake County Sheriff, there had been more criminal activity and calls for police intervention at adult uses in unincorporated Lake County than at other similar commercial establishments in unincorporated Lake County.

Additionally, at the October 9, 2001 County Board meeting, an attorney for the County provided a summary of adult use studies that other municipalities had conducted. That attorney explained that these studies had found, among other things, an increase in crime and negative impacts on property values in areas surrounding adult uses.

On October 24, 2002, Petitioners XLP Corp. d/b/a/ "Dancers" and Danny Christofalos d/b/a "Babydolls," the owners and operators of two establishments featuring live nude dancing in unincorporated Lake County, as well as two adult book and video stores – George Stamatopoulos d/b/a "Video Magic" and Forty-One News, Inc. – filed their Third Amended Complaint against the County challenging the Ordinance, as amended.[2] Petitioners asserted: (1) that the age restriction for adult cabarets violated the Equal Protection Clause (Count I); (2) that the County lacked a "factual predicate" for the Ordinance (Count II); (3) that the Ordinance imposed an impermissible prior restraint (Count III); (4) that the Ordinance granted unbridled discretion to the County to deny a License (Count IV); and

[2] Prior to trial, the state trial court involuntarily dismissed plaintiff George Stamatopoulos d/b/a Video Magic as a sanction for continuing and repeated discovery violations and voluntarily dismissed Forty-One News, Inc. as a plaintiff in the case three days before trial.

(5) that the Ordinance restriction on direct dancer tipping at adult cabarets violated the dancers' Due Process "right to earn a living" (Count V).

On December 6, 2002, the trial court granted the County's motion to dismiss, in part, dismissing Counts III and IV in their entirety.

At trial, the County introduced considerable evidence demonstrating the connection between adult uses and negative secondary impacts. Theodore Johnson testified as an expert in land planning and land use. Johnson has 22 years of experience as a land planner in Lake County, having performed work on numerous developments on behalf of many Lake County local governmental entities. With regard to the adult uses in unincorporated Lake County, Johnson was familiar with and visited the neighborhoods of the adult uses, considered the existing land uses and trends of development and development potential in the immediate vicinity of the existing adult uses, reviewed municipal boundaries, zoning ordinances and zoning maps for the townships within which the adult uses are located, reviewed historical aerial photos of the areas in the immediate vicinity of the adult uses, contacted neighboring municipal officials and developers with developments in the vicinity of the adult uses, and considered the rate and quality of development/redevelopment at other major and comparable intersections within Lake County that are proximate to the intersections at which the Petitioners' adult uses are located.

Johnson opined that the intersections at which the adult uses are located represent prime locations for significant development/redevelopment yet have not developed/redeveloped as would otherwise be expected,

especially when compared to other comparable intersections. Johnson testified that, to a reasonable degree of land planning certainty, the areas in the immediate vicinity of the adult uses had not developed or redeveloped to the extent expected due to the presence of the adult uses at those intersections.

Kathy Kelly, the general manager since 1998 of the adult store Forty-One News, testified that Forty-One News is located adjacent to and shares a common wall with Petitioner Babydolls. Kelly testified that there are 24 fully-enclosed, private viewing booths within Forty-One News where patrons can either preview adult videos or place coins into an "arcade" machine and view continuously-running adult materials on a TV screen. Small round openings, known as "glory holes," are drilled between 12 of the 24 adjoining private booths at approximately waist level. There used to be wastebaskets located in each of the private viewing booths but the wastebaskets had to be removed due to the fact that patrons repeatedly set them on fire. Although there is a rule at Forty-One News that only one patron is permitted in a booth at a time, that rule has to be continually enforced because daily more than one patron at a time attempts to get into a single booth. On a daily basis, Kelly must ask patrons to leave for loitering or stalking other patrons at Forty-One News. The worst problems with patrons at Forty-One News occur between 9:00 p.m. and 3:00 a.m.

Kelly testified that from 1998 to 2003, rooms at the adjacent Motor Inn Motel, were rented at the front desk of Forty-One News. As the manager of Forty-One News, Kelly hired an individual named Jason Strong as a clerk. Strong rented and lived in room 206 or 207 at the Motor Inn Motel until he went to jail for murder.

Dr. Eric Damian Kelly testified for the County as an expert on local government regulation of adult entertainment establishments. This expertise included his knowledge of the numerous municipal studies from around the country showing, describing, and analyzing the adverse impacts that are related to adult uses. In his professional responsibilities, Kelly has personally visited over 70 adult cabarets and over 70 adult book stores. He has reviewed over 20 different sets of adult use regulations adopted by local governments. He has extensive experience in analyzing for local governments the adverse secondary impacts that adult uses can have, as well as the regulations that local governments have used to reasonably address and, if possible, eliminate adverse secondary impacts. Kelly visited the adult use establishments operated in unincorporated Lake County, including the adult cabarets owned by Petitioners.

With regard to the adult bookstores, Dr. Kelly testified that both Forty-One News and Video Magic have adult booths. None of the adult booths at either establishment is monitored by management. At Forty-One News, several of the adult booths have "glory holes" created by drilling through steel plates to create perfectly round holes just below waist level in the walls separating one adult booth from another. Kelly repeatedly observed men loitering outside the adult booths (un-monitored by management) and then entering an adult booth as soon as the adjoining booth was occupied, ignoring the numerous other unoccupied booths. Based on his observations, as well as semen analysis done on the floors of other adult book stores with adult booths, Kelly believes that adult booths with glory holes are used by male customers for masturbation and other sex acts within and between adult booths. Kelly

testified that it was his opinion that the adult booth regulations in the County's Ordinance are reasonably related to preventing prohibited sexual activity.

With regard to the adult cabarets, Kelly visited both Petitioners Dancers and Babydolls adult cabarets. "Fantasy dances" cost $25 at Babydolls, and "lap dances" cost $20 at Dancers. Kelly described a "fantasy dance" he observed at Babydolls, in which a nude employee wrapped her breasts around a customer's face. Kelly testified that these types of activities often lead to improper and illegal conduct, including prostitution. It is Kelly's opinion that the eight-foot dancer-patron distance requirement in the County Ordinance is a reasonable requirement because: (i) it is enforceable, (ii) it ensures that there is no physical contact between dancers and customers, and (iii) it is reasonably related to preventing any illegal activity between dancer and patron.

Kelly also opined on the outside studies on which the County relied, including the Austin, Texas Study; the Garden Grove, California Study, the Houston Study, the Indianapolis Study, the Phoenix Study; and the Tucson Study. Kelly opined that the information and findings in these six studies are relevant to, and can be reasonably relied on by, the County and other local governments to support the type of adult use regulations that the County has adopted. Kelly further testified that the summary of these studies that was provided to the County Board was accurate, and that several of these studies were of publishable quality in serious, academic journals.

Finally, Kelly testified that information regarding actual prostitution convictions at adult use establishments is the type of information that is very useful and relevant

to local governments adopting adult use regulations. The experience that Lake County has had with criminal activity at its adult use establishments is consistent with the adult use experiences that other local governments have had.

Lake County Sheriff's Chief of Operations, Richard Eckenstahler, testified as a law enforcement expert. Chief Eckenstahler reports to the County Sheriff and is directly responsible for the day-to-day operations of the Sheriff's office. Eckenstahler has been employed by the Lake County Sheriff since 1979 and has held virtually every position within the organization. There is no one in the Sheriff's office more knowledgeable about criminal activity occurring within unincorporated Lake County.

Eckenstahler testified about the following specific instances of serious criminal activity at adult uses in unincorporated Lake County during his employment by the Lake County Sheriff.

- the closing of an adult cabaret known as the "Roman House" as a public nuisance in 1985 based on continuing acts of prostitution,
- an unprecedented instance of wired, "sweating" dynamite placed on the roof of an adult cabaret in the early 1980s,
- a patron at the adult cabaret now known as Petitioner Dancers being severely beaten by the bouncer of the cabaret,
- a 1989 arson incident of a fire intentionally set at Petitioner Dancers,
- a second arson incident at Petitioner Dancers in 1995 when a disgruntled patron purchased gasoline and set

the roof of the cabaret on fire while the cabaret was open for business and patrons were inside,

- a December 1996, Lake County Sheriff's undercover operation inside Petitioner Dancers when four Dancers employees, three dancers and one hostess, were arrested for and convicted of prostitution and solicitation,
- a January 2000, Lake County Sheriff's undercover operation inside Petitioner Babydolls when two dancers were arrested and convicted of prostitution,
- a December 1999 undercover reverse sting operation conducted in the parking lot adjacent to Petitioner Babydolls and Forty-One News resulting in several arrests and one conviction for solicitation,
- a 2001 reverse sting operation conducted in the parking lot adjacent to Petitioner Babydolls and Forty-One News resulting in multiple arrests and convictions for solicitation,
- an investigation by the Lake County Major Crimes Task Force that lead to the arrest and conviction of an employee of Forty-One News for first degree murder; the murder occurred at the Motel Motor Inn adjacent to Petitioner Babydolls and Forty-One News where the employee was renting a room.

Eckenstahler also testified to the summary of police reports and police responses prepared under his direction, and presented to the Lake County Board on October 9, 2001, that reveals 202 police reports generated at adult uses in unincorporated Lake County from 1979 through 2001 and 405 additional incidents requiring police intervention at said uses during the same time frame.

Eckenstahler conducted a supplemental study comparing January 1, 2000 to July, 2003 police reports and police interventions/incidents at adult uses in unincorporated Lake County to police reports and police interventions/incidents at similarly sized and located bars and taverns featuring other forms of live entertainment and non-adult bookstores, video stores and novelty stores in unincorporated Lake County. The bars and taverns selected for the study were among the busiest bars in unincorporated Lake County.

The study showed a far higher level of criminal activity, more total police reports and police incidents, at the adult uses than at the bars and non-adult stores. Petitioner Babydolls had 278 combined police reports and police interventions/incidents and Petitioner Dancers had 109 combined police reports and police interventions/incidents between January 1, 2000 and July 2003. The number of police reports and police interventions/incidents for the bars and taverns studied was far lower. There were far fewer sex-related crimes at the bars and taverns than at the adult cabarets. There was no prostitution at the bars and taverns within the study. Moreover, Eckenstahler testified that unlike the bars and taverns that were used for comparison purposes, the adult cabarets in unincorporated Lake County do not serve alcohol. All other factors being equal, establishments that serve alcohol would be expected to have higher levels of criminal activity than establishments that do not serve alcohol; there is a correlation between the sale and consumption of alcohol and crime. The adult stores in unincorporated Lake County – Forty-One News and Video Magic – had 102 and 33 combined police reports and police interventions, respectively, during the time of the study,

compared to 43 police reports and police interventions/incidents at all five of the County's non-adult bookstores, video stores, and novelty shops *combined*.

Eckenstahler testified that in his experience crime at adult uses in unincorporated Lake County is underereported; patrons who are victims of crime at adult uses are hesitant to report because they do not want it known that they were at an adult use. Eckenstahler opined that the level of crime at Lake County adult uses is higher than at other comparable uses in unincorporated Lake County. Much of the crime at and around bars and taverns is alcohol-related; however, the adult uses in unincorporated Lake County do not serve alcohol. More sex-related crime occurs at the County's adult uses than at the non-adult businesses.

Eckenstahler testified that when enforced, County licensing has proven to be an effective law enforcement tool. Eckenstahler stated that he believes that licensing adult uses would be effective in minimizing criminal activity at these establishments.

Petitioners note that they were not allowed to cross-examine Eckenstahler on the total number of prostitution charges initiated in incorporated and unincorporated Lake County, combined, from 2000 through 2003 because the introduction of this documentation was excluded as a discovery violation sanction. Petitioners fail to note, however, that they never raised this exclusionary ruling on appeal to the state appellate court and therefore were deemed to have waived the issue.

Andrea Usry is a Lake County Sheriff's Deputy who patrolled the midnight shift in the area of Babydolls and Forty-One News from 1997 to 2002. She considers this

area to be a "problem" in terms of criminal activity and encountered many instances of criminal activity in the area of Petitioner Babydolls and Forty-One News, including: (1) a man kicking a pregnant woman on the ground in the parking lot of Babydolls, (2) a child left unattended in a vehicle alone at 2:00 a.m. while his father was in Forty-One News, (3) two men having sexual relations in the Babydolls/Forty-One News parking lot, and (4) a dancer at Babydolls attacking another dancer with scissors.

In December 1999, Usry worked on an undercover prostitution reverse sting in the Babydolls/Forty-One News parking lot that resulted in three arrests and one conviction for solicitation. At that time, she gained information that led to the arrest and conviction of Jeremy Tweedy for obstruction and Jason Strong, an employee of Forty-One News, for murder of an unidentified woman found in a Lake County forest preserve. The murder occurred on the premises of the motel located adjacent to Petitioner Babydolls and Forty-One News. Usry testified that Strong lived in Room 206 of the motel.

Officer Cory Kelly is a patrol officer for the City of Waukegan, Illinois. On November 20, 2001, she participated in an undercover law enforcement reverse sting operation, posing as a prostitute in the Babydolls parking lot. During one, six hour detail, her work led to seven arrests and six convictions for solicitation.

According to stipulation introduced at trial, the autopsy of a woman found in the Greenbelt Forest Preserve in North Chicago in December 1999 revealed that the woman died from blunt force trauma to her head and that the victim's body was covered with bruises, burns, and other injuries consistent with whipping, hot wax

melted on her body, and various punctures and body piercings.

According to stipulation introduced at trial, the items found in Room 206 of the Motor Inn Motel in December 1999, included various adult videos, whips, candles, body piercing materials and tape.

At trial, none of Petitioners' witnesses undermined the County's evidence. Petitioners called Dr. Judith Hanna as an expert on dance as it relates to anthropology. Hanna offered opinions concerning erotic dancing at adult cabarets. Since 1995, Hanna has testified as an expert witness on erotic dance in 63 different lawsuits, all but one on behalf of adult uses against local governments regulating adult uses. Hanna reached her conclusions and wrote her report in this case prior to visiting Lake County or the Petitioners' establishments and only visited one of the two Petitioner adult cabarets for the first time the night before she testified. In her 63 different lawsuits, not one of her adult use clients had even one dancer or employee convicted for solicitation or prostitution from conduct within the adult cabaret.

Robert Bruce McLaughlin testified for the Petitioners as an expert in planning and zoning issues and municipal regulations regarding adult entertainment. McLaughlin opined on several studies that he believes demonstrate that adult uses do not cause secondary effects. None of these other studies or documents were admitted into evidence in this case and none of these studies or documents were part of the record before the County Board when it adopted its Adult Use Ordinance.

McLaughlin admitted (i) that two of the three volumes of his April 1 "report" were already "on the shelf" and any

new material in the third volume was prepared in less than 48 hours; (ii) that when he prepared his report he had not reviewed the Lake County Ordinance; (iii) that when he made his report he did not know that the County had relied on studies other than the Indianapolis and Austin studies; (iv) that his opinions in this case were made without ever having been to Lake County or to either of the Petitioners' establishments; (v) that, because he wasn't "given enough time" by Petitioners, his opinions in this case were made without ever having reviewed the report that the County's expert had prepared; (vi) that he did absolutely no field work or inspections in this case; and (vii) that he did not even write his own opinions in this case.

McLaughlin further acknowledged that he developed his opinions without any knowledge whatsoever of the prostitution and other convictions at Petitioners' Lake County establishments. McLaughlin testified that he is concerned that he did not have this information and that to this extent his work in this case is less valuable to the court. McLaughlin further stated that his testimony was limited to outside studies and not on whether Petitioners' establishments have problems or cause secondary effects. He acknowledged that Illinois prostitution convictions at Petitioners' establishments would be a concern to him and might have impacted his opinions on whether adult uses in Lake County cause adverse impacts.

Michael Crissman, the owner and operator of Petitioner "Dancers" adult cabaret, testified to various illegal conduct occurring at his establishment, including: (1) an incident when a disgruntled patron left Dancers, purchased gasoline, returned, and set the cabaret on fire; (2) a 1990 incident when a Dancer's patron got in a dispute

with a dancer that escalated into a fight between the patron and Crissman that left the patron severely injured and lead to Crissman's conviction for aggravated battery; (3) a 1991 fight that Crissman got into with another patron in which punches were exchanged; and (4) a 1996 undercover operation by the Lake County Sheriff's Office inside Dancers, when four Dancers employees were "hired" by an undercover police officer to perform a "party," including lap dances, which conduct of the four employees lead to their arrest, trial, and ultimate 1998 convictions for prostitution.

Contrary to Petitioners' Statement of the Case, Petition, p. 7, there was no evidence at trial that requiring Dancers to close at midnight would result in the loss of 75% of Petitioner XLP's revenue. Nor was there any evidence that the business could not continue to operate under the County's Ordinance. Petition p. 12. The only testimony was that the current configuration and operation were not in compliance with the County's Ordinance.

Danny Christofalos, the owner and operator of Petitioner "Babydolls," also testified. Babydolls is an adult cabaret with a common wall with the adult bookstore Forty-One News and shares a parking lot with the Motel Motor Inn, located approximately 200 feet to the south of Babydolls. Christofalos testified that in January 2000, a Babydolls waitress and a Babydolls dancer were arrested and convicted for solicitation and prostitution, respectively, for activities that took place within Babydolls. Christofalos testified that he would fire any of his employees who break the rules regarding improper behavior with customers. However, neither of these women was ever reprimanded or fired after their conviction.

Christofalos also testified that notwithstanding recently installed surveillance cameras, posted dancer rules, and monitoring by company personnel, dancers at Babydolls continued to violate the rules regarding improper contact with customers. Contrary to Petitioners' Statement of the Case, Petition, pp. 7, 12, there was no testimony from Christofalos that Babydolls would have to close if it had to comply with the Ordinance. Christofalos merely testified that compliance with the County's Ordinance would require Babydolls to make unspecified changes to the format to its entertainment.

Diana Lancaster, the head dancer at Petitioner Dancers, testified that she can effectively communicate her erotic message as a dancer on a stage eight feet away from patrons.

On November 25, 2003, the state trial court entered a directed finding in favor of the County on Count V and entering judgment in favor of the County on Counts I and II of the Third Amended Complaint. *See* Petition, Appendix B. The state trial court also made extensive oral findings (Appendix 1), all of which are incorporated into its written judgment order. Petition, Appendix B.

The trial court made the following findings with respect to Petitioners' equal protection claim:

- the age restriction on adult cabarets is not subject to strict scrutiny;
- the court may hypothesize as to reasons that the restriction is rational even if that reason is not articulated by the legislature in enacting the restriction;

- the County may have reasonably believed that 18-year-olds lack the maturity and experience of 21-year-olds and wanted to prevent after-prom parties and other high school gatherings at establishments featuring live nude dancing;

- a rational bases for the age restriction exists and the Petitioners failed to negate every conceivable basis for the restriction.

Appendix 1, pp. 4-5.

The trial court made the following findings with respect to Petitioners' challenge to the factual predicate to the Ordinance:

- contrary to Petitioners' contention in their Statement of the Case, *see* Petition, p. 11, the state trial court found that the correct test for judging the constitutionality of the County's Ordinance is set forth in *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986) and *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002), to wit: 1) whether the Ordinance imposes a total ban on adult uses or contains time, place and manner regulations, 2) whether the Ordinance is content based or content neutral, and, if the Ordinance is content neutral, 3) whether the Ordinance serves a substantial governmental interest and allows reasonable alternative avenues for communication of protected speech;

- the County's Ordinance does not ban all adult uses but restricts the time, place, and manner of performances and other activities;

- the stated purpose for the enactment of the Ordinance is to address negative secondary effects;

- in enacting the amended Ordinance in 2001, the County Board could have reasonably believed that the

evidence and information presented to it was relevant to the problem of negative secondary effects from adult uses;

- the evidence presented to the County Board in 2001, included: 1) a summary of studies of secondary effects from other municipalities that, according to the County's trial expert, were of academic peer review quality, 2) a report presented by a local law enforcement officer reflecting over 200 police reports and over 400 police responses at adult uses in unincorporated Lake County, 3) information provided by that same local law enforcement official concerning prostitution convictions at the Petitioners' businesses, and 4) the law enforcement officer's opinion that a disproportionate amount of criminal activity occurs at and around adult uses in unincorporated Lake County;

- the Ordinance was supported by evidence at trial that the County Board could have reasonably believed to be relevant to the problem of negative secondary effects at adult uses in unincorporated Lake County and that justified enactment of the Ordinance, including:

    - none of Dr. Hanna's other adult use clients had even one prostitution conviction;

    - McLaughlin admitted that he was unaware of the prostitution and solicitation convictions at Petitioners' businesses, that such information would have been important in formulating his opinions, and that his opinions in this case were therefore less valuable to the court;

    - "considerable" evidence of prostitution and solicitation convictions in and outside of the Petitioners' businesses between 1996 and 2001, including four convictions for prostitution and solicitation inside Dancers, two convictions for prostitution

and solicitation inside Babydolls, seven arrests for solicitation at the Babydolls parking lot, resulting in six convictions for solicitation;

- four undercover operations conducted by law enforcement at Petitioners' establishments between 1996 and 2001, each resulting in prostitution-related convictions;
- Chief Eckenstahler's opinion on disproportionate incidence of crime and police interventions at adult uses in unincorporated Lake County as confirmed by the results of the comparative study conducted under his direction;
- testimony that one female law enforcement officer posed as a prostitute in six undercover operations at different locations and made twenty arrests for solicitation during those operations; seven occurring in one reverse sting operation at the Babydolls parking lot;
- Deputy Usury's testimony that the Video Magic/ Babydolls/Forty-One News area is a "problem," with examples of illegal conduct, including sex acts in a car between two men in the Babydolls parking lot, a Babydolls dancer threatening another dancer with scissors, a pregnant woman beaten in the Babydolls parking lot, and a six-year-old child left in a locked car at 2:00 a.m. while the father was inside an adult bookstore;
- testimony of the Forty-One News manager that waste baskets in the adult booths were repeatedly set on fire, that on a daily basis more than one person attempts to enter an adult booth, that on a daily basis unwelcome patrons must be asked to leave, and that the "worst" time for improper activity is between 9:00 p.m. and 3:00 a.m.

Appendix 1, pp. 5-10.

On appeal to the Illinois Second District Appellate Court, Petitioners challenged only the state trial court's rulings with respect to Count I (equal protection violation), II (evidentiary predicate for the Ordinance), and IV (unbridled discretion in requesting certain information from license applicant). Significantly, Petitioners did not challenge or raise an issue on appeal with respect to any of the trial court's evidentiary rulings.

On May 26, 2005, the Illinois Second District Appellate Court issued its unpublished decision in which it conducted a thorough and reasoned analysis of existing United State Supreme Court precedent. *See* Petition Appendix A, pp. 6a-14a. Contrary to Petitioners' position, the appellate court delved deeply and "directly into the facts of the bench trial" (Petition, p. 3), summarizing much of the relevant testimony evidencing the existence of negative secondary effects at and around the Petitioners' businesses. *See* Petition Appendix A, pp. 15a-22a. In affirming the trial court's judgment, the state appellate court found that "the evidence on the record adequately demonstrates a substantial connection between the ordinance and the secondary effects it is targeted at controlling." Petition, Appendix A, p. 25a.

The state appellate court published its decision on July 8, 2005. *XLP Corp. v. County of Lake*, 359 Ill. App. 3d 239, 832 N.E.2d 480 (2nd Dist. 2005).

REASONS FOR DENYING THE PETITION

I. Introduction

Petitioners present two bases for this Court to grant certiorari: 1) to resolve purported conflicting interpretations of prior decisions of this Court by other lower courts, and 2) to review the adequacy of the evidence of negative secondary impacts introduced at trial. Petition, "Questions Presented," p. i. Whatever alleged inconsistent standards Petitioners complain other lower courts have applied to analyzing regulations on adult uses is of no consequence here. There is no dispute that the state trial and appellate courts in this case properly followed this Court's dictates and any further ruling from this Court on the topic would be entirely advisory in nature. As to the second question raised in support of certiorari, Petitioners merely seek to have this Court reweigh the extensive evidence introduced at trial. Disagreement over a lower court's factual findings is not a proper basis for granting the extraordinary writ of certiorari. The Petition should be denied.

II. Petitioners Complain of Alleged Erroneous Factual Findings by the State Trial and Appellate Courts

Rule 10 of the Rules of the Supreme Court sets forth the considerations that govern this Court in exercising its discretionary power to grant a petition for certiorari. The reasons for granting certiorari include a decision of a circuit court of appeals that conflicts with another circuit court of appeals on the same important matter, a state court of last resort has decided an important federal question in a manner that conflicts with a decision of another state court of last resort or circuit court of appeals,

or a state court has decided an important question of federal law that has not been decided by this Court or in a way that conflicts with prior decisions of this Court.

This case presents none of the circumstances for review set forth in by Rule 10. Rather, it involves the decision of an intermediate state court (the Illinois Second Judicial District Appellate Court – the Illinois Supreme Court denied leave to appeal), relating to a subject that has been the focus of several recent decisions of this Court (the evidentiary foundation necessary to justify the adoption of regulations governing adult uses), in a holding that is entirely consistent with this Court's rulings in, among others, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), *City of Erie v. PAP's A.M.*, 529 U.S. 277 (2000), and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

In fact, the state appellate court carefully reviewed and analyzed this Court's prior relevant decisions and correctly set forth the established standards for judging whether an adequate factual predicate has been established to support adult use regulations. Petition, Appendix A, pp. 6a-14a. Notwithstanding conclusory statements to the contrary, Petitioners never directly challenge the state appellate court's restatement of the applicable guiding legal standards nor do they articulate the holdings of this Court that the state appellate court allegedly ignored.[3]

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[3] Petitioners do, however, misstate the standard that the state trial court actually applied to Petitioners' "factual predicate" challenge, incorrectly suggesting that the trial court applied a rational basis review. *See* Appendix 1, p. 6; Petition, Appendix A, p. 22a.

Petitioners do take issue with several evidentiary rulings by the state trial court, such as the rulings sustaining the objections to a line of questioning of one of the County's attorneys (*see* Petition, p. 5), and the exclusion of information on the total number of prostitution prosecutions initiated in Lake County from 2000 through 2003 (*see* Petition, p. 10). However, in addition to the fact that routine civil trial court evidentiary rulings seem particularly unworthy of review by certiorari, these particular rulings were never raised on appeal below, and, of course, "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not consider it." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148, n.2 (1970); *Lawn v. United States*, 355 U.S. 339, 362-63, n.16 (1958).

What Petitioners complain most vehemently about in the first half of the Petition, is the factual findings and credibility determinations made by the trial court and affirmed by the appellate court. However, a "petition for writ is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10, Rules of the Supreme Court. This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Nor is this a case, *see* Petition, pp. 3-4, n.2, where the Court must consider the specific facts to make a determination whether or not a constitutionally protected interest is at stake. *Compare Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927) (obscenity case); *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (same).

Petitioners cite to Justice Kennedy's concurrence in *Alameda Books* and complain that the state trial and appellate courts did not adequately consider whether the Ordinance impacted a greater than necessary "quantity of

speech." Petition, pp. 12, 15. However, Petitioners presented no evidence at trial to support any argument that the Ordinance would require the demise of any or all adult uses within the County. Petition, pp. i and 12. More fundamentally, the County's Ordinance, unlike the "dispersion" regulation at issue in *Alameda Books*, does not govern the location (or relocation) of adult uses. Thus, this case does not present any threat that the Ordinance, by design or effect, will significantly reduce the "quantity of speech" by eliminating existing outlets for protected speech. Rather, this case involves nothing more than typical adult cabaret operational regulations that have uniformly been upheld by courts across the country – *buffer zone*, *see e.g.*, *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986) (ten-foot buffer upheld); *Colacurcio v. City of Kent*, 163 F.3d 545, 553-54 (9th Cir. 1998) (reaffirming *Kev*); *Ino Ino, Inc. v. City of Bellevue*, 937 P.2d 154, 167-71 (Wash. 1997) (*en banc*) (eight-foot); *ban on total nudity*, *see City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000); *Barnes v. Glen Theater*, 501 U.S. 560 (1991); *tipping restrictions*, *Kev*, 793 F.2d at 1062; *City of Colorado Springs v. 2354*, 896 P.2d 272, 298 (Colo. 1995); *elevated stage*, *LLEH, Inc. v. Wichita County, Texas*, 289 F.3d 358, 368 (5th Cir. 2002), *cert. denied*, 537 U.S. 1045 (2002); *BSA, Inc. v. King County*, 804 F.2d 1104, 1111 (9th Cir. 1986); *Kev*, 793 F.2d at 1061; *City of Colorado Springs*, 896 P.2d at 298; *hours of operation*, *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1159 (9th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2002).

Thus, the Rule 10 considerations governing the granting or denial of certiorari all weigh heavily against Petitioners.

III. Petitioners' Allegation that Lower Courts Have Misconstrued this Court's Dictates Does Not Justify Granting Certiorari

The second half of the Petition amounts to little more than a critique of *other* courts' alleged misapplication of this Court's precedents, Petition, pp. 21-29, and Petitioners' perception that an advisory opinion from this Court is necessary to "establish an unequivocally 'clear set of principles,'" for every court in the country "to apply consistently and with precision." Petition, p. 15. But certiorari jurisdiction is reserved for issues whose importance is "beyond the academic," *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955), and, in the end, the fact that *other* courts may not have followed this Court's mandates does not warrant the granting of certiorari from a court that did.

In particular, Petitioners suggest that certain other courts may have erroneously upheld adult use regulations: 1) in the absence of any evidence of negative secondary impacts, 2) in the absence of any pre-enactment evidence, 3) based entirely upon anecdotal evidence, or 4) without affording an adult use any opportunity to challenge the local government's evidence of secondary effects. Petition, pp. 21-29. But this case suffers from none of these perceived deficiencies. Here, the state trial and appellate courts found that adequate pre-enactment evidence of negative secondary effects was present and could reasonably have been relied upon by the County Board. Petition, Appendix A, pp. 12a-13a; Appendix 1, p. 8. Moreover, the state trial and appellate courts held that the County adduced considerable additional specific and non-anecdotal evidence of such negative impacts at trial, Petition, Appendix A, p. 23a; Appendix 1, pp. 8-10, and

that this additional evidence demonstrated a "substantial connection between the ordinance and the secondary effects it is targeted at controlling." Petition, Appendix A, p. 25a; Appendix 1, p. 8. The evidence was clear at trial – no fewer than 13 sex crime convictions and other criminal activities have taken place in the years immediately proceeding and following enactment of the Ordinance *at the Petitioners' establishments.* Petitioners were given a full trial with ample opportunity to "cast doubt" and challenge the County's evidence concerning the basis for enacting the Ordinance; Petitioners simply could not overcome the overwhelming evidence. Petition, Appendix A, p. 24a; Appendix 1, pp. 7-8.

Petitioners would have this Court engage in an academic exercise to address perceived ambiguities in this Court's earlier rulings and alleged conflicts between *other* lower courts not properly raised by the facts or the law applied in *this* case. Petition, pp. 21-29. Respectfully, the Court should decline such an open-ended invitation.

CONCLUSION

Respondent prays that the Court deny Petitioners' petition for writ of certiorari.

Respectfully submitted,

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APPENDIX 1

Court Caption for Jasica Appendix

XLP Corp., d/b/a "Dancers", Michael J. Christofalos and Danny Christofalos, d/b/a "Baby Dolls", George Stamatopoulos, d/b/a "Video Magic" and Forty One News, Inc., d/b/a "41 Books",	Case No. 98 CH 1106
Plaintiffs,	Circuit Court of the Nineteenth Judicial Circuit
v.	Lake County Ill.
County of Lake,	
Defendants.	

[1] THE COURT: I reserved on Count – on the County's motion for directed finding as to Count Five. I will rule on that motion for a directed finding now.

I will grant the motion for a directed finding on Count Five. In Count Five of the complaint, plaintiffs allege that tipping restrictions of Section 13 of the ordinance denied plaintiffs their due process right to earn a living. Section 13.C provides as follows: Tipping. No tip or gratuity from any adult establishment patron may be offered or accepted for any performance by an adult establishment employee on any adult cabaret stage at any time prior to the completion of any such performance. No adult establishment patron shall offer and no adult establishment employee having performed on any cabaret stage shall accept any form of tip or gratuity offered directly to the employee by the adult establishment patron. Rather following completion of a performance all tips and gratuities to adult establishment employees performing any cabaret stage

shall be placed into a receptacle provided for receipt of such tips and gratuities by the adult entertainment establishment.

Count Five specifically claims that in position of a taping [sic] receptacle totally destroys the ability of an individual performer to obtain benefit derived from her [2] individual legal performance efforts and this arbitrary restriction destroys the performer's right to earn a living.

Dr. Hanna did testify that tipping during a performance is important because tips serve to acknowledge that a patron is getting the dancer's message and is part of the dance performance. Dr. Hanna said that if there are no tips there is no feedback for the dancer. Dr. Hanna did not testify concerning the economic or financial consequences of different types of tipping; that is, tipping during a performance versus tipping after a performance nor did she testify concerning the consequences between handing a tip directly to a dancer versus placing a tip in the receptacle. Actually no evidence was presented on the financial impact of Section 13.C.

As to Dr. Hanna's concern of feedback to the dancers, there are alternative means for patrons to give feedback. As was stated in Kev, K-E-V, v. Kitsap, K-I-T-S-A-P, 739 – that is wrong. 793 F. 2d 1053 at 1062, Ninth Circuit, 1986, "While the tipping prohibition may deny patrons the means of expressing pleasure with the dancer's performance" – let me start that quote again.

"While the tipping prohibition may deny patrons one means of expressing pleasure with the dancer's performance, sufficient alternative methods to communicate [3] exists for the patrons to express the same message."

Additionally, the fact that a regulation will result in lost profits as – or higher overhead or require establishments to pay dancers more doesn't make the regulation unconstitutional. Tily B, T-I-L-Y-B, v. Newport Beach, 81 Cal. Rptr. 2d 6. California Appellate Court, actually Court of Appeals, 1998, and Colacurcio, C-O-L-A-C-U-R-C-I-O, v. Kent, 163 F. 3d 545 at pages 556 and 57, Ninth Circuit, 1998.

Under Section 13.C there is no ban on tipping, merely restriction on how tips are to be transferred to a dancer. The restriction does not prevent dancers from working, being paid, or receiving tips or earning a living. See DCR v. Pierce County, 964 P. 2d 380, Washington Court of Appeals, 1998.

It seems to me that plaintiff's claim in part assumes that Section 13.C would permit only one receptacle for tips where tips for all dancers would have to be jointly placed. While the issue isn't before me, then interpretation does not seem to be required by the statute, by the ordinance.

Finally, this restriction on tipping is rationally related to the County's interest in lessening opportunity for prostitution and other illegal activity facilitated by [4] the close contact between patrons and employees. The motion for directed finding is granted as to Count Five.

I will hold off on the rest. I will rule about three o'clock on the other remaining parts. Court is in recess until three. Thank you very much.

(A recess was had.)

THE COURT: Thank you for waiting. I have reviewed all the evidence, all the paperwork submitted. I am prepared to rule on the other two counts.

Count One alleges that the restrictions in the ordinance violate the Equal Protection Doctrine on their face and as applied. Because restrictions are arbitrary and unreasonable, the unreasonably-imposed restrictions on adult establishments not imposed on non-adult businesses.

Additionally, Count One claims that the – that requiring patrons and employees of adult cabarets to be at least 21 years old violates the Equal Protection Clause because patrons and employees of adult stores, adult theaters, and adult – because patrons and employees of adult stores, adult theaters need only be 18 years of age.

I find that there is no form of protected association presented here for any protective class or suspect classification. As a result, the rational basis test is applicable. Legislation examine [sic] only for [5] rationality enjoys a strong presumption of validity because a legislative body has brought [sic] discretion and created classifications and is allowed great flexibility in addressing different needs. Accordingly, rational basis review is limited and highly differential and a paradigm of judicial restraint and the burden is on the challenger to negative [sic] every conceivable basis that might support it.

To meet the test, it is not necessary that the legislative body describe its goal or articulate its purpose in enacting the ordinance. The Court may hypothesize reasons for the law even if the reasons didn't motivate the legislative body. As long as there is any reasonable conceivable state of fact showing the act is rational, the act must be upheld. That is basically a statement from Arangold, A-R-A-N-G-O-L-D, v. Zehnder, Z-E-H-N-D-E-R, 329 Ill. App. 3d 781, First District, 2002, which is a tax case

which I know is different but cites all the leading cases on the rationale review from both statements that I made.

The only provision of the ordinance I will specifically mention here is a provision specifically mentioned in Count One; namely, that a person has to be at least 21 years of age to be a patron or to be employed by an adult cabaret. This provision does bear rational relationship to the legitimate state interest of protecting [6] young persons between 18 and 21 years who may lack maturity and experience of older adults and may be more vulnerable than older persons.

It certainly may have been the County's desire in part to prevent after-prom parties or other gatherings of high school students at this type of business establishment. Indeed, the preamble to the ordinance cites the protection of young people and students. Age, I should say, or similar age restrictions have been upheld. See C-O-R-P v. Board, 799 P. 2d 917, Colorado, 1990, and Burnett v. San Francisco Company, 42 Cal. Rptr. 879, 1995. The latter case does not have to do with adult cabarets, but is an age restriction on dance halls.

As to the other restrictions of the ordinance attacked in Count One, I find that the plaintiff has not negated every conceivable basis supporting the restrictions and that the restrictions at least for the purpose of the equal protection challenge and, in fact, the evidence presented here establishes the restrictions are rationally related to the County's stated purposes. So judgment is entered for the defendant on Count One.

Count Two. Ordinances regulating the conditions under which adult entertainment businesses may operate are analyzed as a time, place, and manner regulation

pursuant to [7] the City of Renton, R-E-N-T-O-N, v. Playtime, 475 U.S. 41, 1986; and Los Angeles v. Alameda, 535 U.S. 425, 2002.

A Court must first determine whether the ordinance imposes a total ban on adult uses or myriadly time, place, or manner restrictions.

Second. Assuming the ordinance is found to be a time, place, and manner regulation, the Court must decide whether the ordinance is content based or content neutral. If the ordinance is content based, the subject restricts scrutiny. If it is content neutral, it is subject to immediate scrutiny.

Third. If it is content neutral and therefore subject to immediate scrutiny, the Court must then decide whether the ordinance will comply with the services substantial governmental interest and permits reasonable avenues of alternative communication.

Applying this test to the ordinance in question, I first find the ordinance does not ban all the adult uses. It establishes restrictions on time, place, and manner of performances, and other activities.

The next inquiry is whether the ordinance is content neutral; that is, whether the ordinance is aimed at the content of the activity at the adult establishments or at the purported secondary effects of the establishments on [8] the surrounding community. "In determining whether a regulation is content neutral, the government's purpose in enacting the regulation is the controlling consideration." L.L.C. v. Aurora, 136 F. 3d 683 at 686, 10th Circuit, 1998.

Quoting from Ward v. Rock, 491 U.S. 781 at 791. "In determining the legislative body's intent, a Court can look

to the text of the ordinance, any preamble or expressed legislative findings, or stated purpose of the regulation." Ben's Bar v. Somerset, 316 F. 3d 712 at 723, footnote 28, Seventh Circuit, 2003. S.O.B. v. Benton, 317 F. 3d 856 at 862, Eighth Circuit, 2003. Carandola, C-A-R-A-N-D-O-L-A, v. Bason, B-A-S-O-N, 303 F. 3d 507 at 514, Fourth Circuit, 2002.

Here the ordinance by its terms including the recitals in the preamble to the original ordinance, Joint Exhibit 3, which are incorporated into the ordinance amending the Lake County Adult Use Licensing Ordinance, Joint Exhibit 4, is designed to prevent crime, prevent the deterioration of neighborhoods, protect stability of other businesses, and protect property values, and the health, safety, and general welfare of the county and its residents.

As a result, I find at least the stated purpose of the ordinances address the purported secondary effects and not suppress unpopular speech and; therefore, content [9] neutral and subject to immediate scrutiny.

As to the third stage of the analysis, the government must reasonably believe the evidence it relies on is relevant to the problem of secondary effects it seeks to address. Also the government's evidence must fairly support its rationale. Further, a plaintiff challenging the ordinance must be given an opportunity to cast direct doubt on the purported rationale either by demonstrating that the municipality's evidence doesn't support its rationale or by furnishing evidence that disputes municipality's factual findings.

If the plaintiff succeeds in casting doubt on municipality's rationale in either manner, then the burden shifts back to the municipality to supplement the record with

evidence renewing support for a theory that justifies its ordinance. It's Renton, 121 S. Ct. at 736. And Peek-A-Boo at 337 F. 2d 1251.

After reviewing the transcript of the proceedings of 10/9/01, I find that the evidence relied upon by the County Board in enacting the amended ordinance could reasonably be believed to be relevant to the problem of secondary effects and that the evidence fairly supports the County's rationale. At least some of the summaries – strike that, At least some of the studies summarized for [10] the Board according to Dr. Kelly, were academic journal quality could be published, and he did do peer – he did review publications for peer review journals.

In addition, a local law enforcement official testified 200 reports of criminal activity and twice as many interventions to assist at adult businesses. He testified as to his opinion that there is more criminal activity at adult businesses and he testified the convictions for prostitution at these businesses.

Assuming that the plaintiff has cast doubt on the County's rationale, I find that the additional evidence presented at the trial more than supports a theory justifying the ordinance. One important part of the evidence is the evidence of actual prostitution and solicitation convictions in and outside of the plaintiff's businesses. This is important because curtailing public sexual contact and sexual criminal offenses represents a significant state interest.

Dr. Hanna stated that in the 63 times she has testified as an expert in exotic dance cases, in none of those cases were there even a single prostitution conviction. Mr. McLaughlin testified that prostitution convictions within

five years would impact his opinions on secondary effects and that he didn't have information on [11] prostitution convictions before he formulated his opinions in this case and normally he would have had such information and that his testimony in this case was less valuable to the Court than in other cases where he had the information.

The evidence of prostitution and solicitation here is considerable, at least what I would consider considerable, based on the evidence including the four prostitution convictions at Dancers in 1997, two convictions in 1998 at Baby Dolls, three solicitations and an undercover operation in December 1999 at and near – 1999 at and near Baby Dolls, Officer Kelly's seven arrests for solicitation in 2001 at or near Baby Dolls resulting in six convictions and a seventh person having possession of a gun.

As far as the evidence shows, there have been four undercover operations, prostitution operations between 1996 and 2001 each of which resulted in convictions. I suppose, you know, undercover investigations could be classified as secondary effect. How much time and money and effort does a police department want to put into going into cabarets and other types of places to determine whether there is prostitution.

Also significantly here Officer Kelly testified that in her career she has posed as a prostitute six times with a total of about 20 arrests. It is significant that [12] seven of the 20 of those arrests came from her single outing at Baby Dolls. In addition, Chief Eckenstahler testified to his opinion that the type of adult uses, that these types of adult uses have higher incidents of crime and police interventions and that is certainly supported by Defendant's Exhibits 32 through 46.

Officer Usry testified that Route 173 and 41 was a problem area and backed up that opinion with examples. One example was two men engaged in a sex act in a car in Baby Dolls's parking lot. A dancer pulling scissors on another dancer. A pregnant woman being beaten in the parking lot between Baby Dolls and the gas station. A six year old being left in a truck at two a.m.

In addition, Ms. Kelly testified they had to prohibit waste baskets in the video viewing rooms because people set them on fire. That on a daily basis more than one person tries to get into a viewing booth with another person which is against the rules. And daily she had to ask people to leave 41 News. She testified that between nine p.m. and three a.m. is the worst time in the store.

All of this together with the other evidence of arson and dynamite and one murder and the out-of-state studies certainly seems to me to support the County's ordinance in attempt to lessen secondary effects. I think [13] County Board members could reasonably believe that these types of things, waste baskets being set on fire, prostitution, pregnant women being kicked in the parking lot, six year old left at two a.m., two men engaging in sex act in the parking lot were less likely to occur in or near bars or at or near Blockbusters, in or near Panara [sic] Bread or other business establishments.

I will mention a couple other things. As far as minimum distance requirements go, there is no constitutional guarantee to the maximum erotic experience possible. And according to Ms. Lancaster whose testimony I find in its entirety to be credible, said she can still communicate her same message at eight feet.

Similarly, the 18-inch stage elevation and the barrier of three feet found in the ordinance are reasonable restrictions and do not interfere with plaintiff's constitutional right to exotic dancing. Time restrictions is found in the ordinance have been upheld. Schultz v. Cumberland is one example, 228 F. 3d 831, Seventh Circuit, 2000. That was ten a.m. to midnight.

Also evidence supporting the sign restrictions from Mr. Johnson, see in that regard D.J. v. Houston, 837 F. 2d 1268, Fifth Circuit, 1988. Nudity – a ban on nudity has been upheld. Youth restrictions have been upheld also.

[14] Also I want to note that the requirement of narrow tailoring does not require the least restrictive means or the least restrictive alternative. I also want to note that I recognize that it may be argued that the O'Brien test rather than the Renton test should be used to evaluate this ordinance or at least parts of this ordinance. If so, my decision would be the same. Since the second prong of the O'Brien test and the third prong of the Renton test are in my opinion virtually indistinguishable.

As a result, the relief requested in the third amended complaint by the plaintiff is denied. Judgment is entered in favor of the defendant on all the remaining counts.

All I want is a written order that says for the reasons stated in open court directed finding is entered on Count Five and judgment in favor of defendants entered on Counts One and Two, the only remaining counts, for the reasons stated in open court and then list this court reporter's name and address in the order.

Gentlemen and lady, all the documents, all the exhibits are going to be admitted into evidence so make sure the clerk has the right ones. I think they are all here.

Before I ask if there is any further, I do want to thank the attorneys, each of the attorneys on the record for [15] a very professional presentation of all the evidence and all the legal arguments.

Do we have anything else that we need?

MR. FRIEDMAN: Nothing additional from the plaintiffs at this time, Judge, except we express our gratitude for your time in this case.

THE COURT: You are more than welcome. Feeling is mutual. I know you people made the same effort to have all this time. Thank you.

(Which was all the evidence offered and received on said date in said cause.)